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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the court of appeals upheld a Baltimore ordinance that bans cigarette advertising on certain outdoor signs. The questions presented are:

1. Whether a restriction on non-misleading commercial speech may be upheld where the reviewing court asked only whether the legislature could have found a "logical nexus" between the restriction's means and ends, and made no independent inquiry whether the restriction either would in fact materially advance its goals or was narrowly tailored to do so.

2. Whether an ordinance that bans cigarette advertising on billboards escapes preemption under the Federal Cigarette Labeling and Advertising Act on the ground that the ordinance does not purport to dictate the content of cigarette advertisements.

RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. Petitioner Penn Advertising of Baltimore, Inc. ("Penn") is a Delaware corporation. Its parent company is Penn Advertising, Inc. Penn has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 63 F.3d 1318. The opinion of the district court (Pet. App. 13a-45a) is reported at 862 F. Supp. 1402.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1995, and a timely petition for rehearing was denied on October 16, 1995. Pet. App. 68a-69a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), provides: "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

STATEMENT

1. This case involves a challenge, under the First Amendment and on federal preemption grounds, to an ordinance ("Ordinance 307" or "the ordinance") of the City of Baltimore, Maryland ("the City"), that bans cigarette advertising on certain outdoor signs. Pet. App. 70a-78a. The ordinance prohibits signs or "other form[s] of advertising that advertise[ ] cigarettes in a publicly visible location," and defines "publicly visible location" to include "outdoor billboards, sides of building[s], and free standing signboards." Baltimore City Code, art. 30 (zoning), § 10.0-1(I) (Pet. App. 75a). At the same time, however, the ordinance creates significant exceptions to this restriction, permitting cigarette advertisements (1) on buses and taxicabs, and on commercial vehicles used to transport cigarettes; (2) at locations licensed to sell cigarettes, which allows many signs and display advertisements in and on the outside of numerous

stores; and (3) at professional sports stadiums.[1] *Id.* at 75a-77a; see also *id.* at 79a-82a (later ordinance broadening exemption for signs on stores that sell cigarettes).

The City enacted the ordinance for the stated purpose of attempting to "reduce[ ] the illegal consumption of cigarettes by minors." Pet. App. 4a. In adopting the ordinance, the Baltimore City Council cited studies it characterized as suggesting that advertising may stimulate the consumption of cigarettes by minors, that cigarettes commonly are used by minors, and that use of cigarettes may lead to the abuse of hard drugs. See *id.* at 3a-4a. The Council did not, however, receive or rely upon any evidence indicating that Ordinance 307's particular and qualified restriction on billboard and similar advertising would have *any* effect, let alone a material one, on the use of cigarettes by minors.

Petitioner Penn Advertising of Baltimore, Inc. ("Penn") is engaged in the business of displaying commercial and public service messages on outdoor signs located throughout Baltimore. Penn leases property from private owners for its signs, erects and maintains the signs, and makes its signs available to advertisers who wish to display their messages in Baltimore. Penn's customers include companies that advertise cigarettes. It is not disputed that the commercial messages displayed by Penn are truthful, non-misleading, and concern lawful activity.

Penn brought this challenge seeking a judgment that Ordinance 307 is inconsistent with the First Amendment to the United States Constitution and is preempted by Section 5(b) of the Cigarette Labeling and Advertising Act ("the Act"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of * * * cigarettes." 15 U.S.C. § 1334(b). After the City moved to dismiss the action or, alternatively, for summary judgment in its favor, the district court denied Penn's request for additional time to conduct discovery concerning the City's intent in enacting the ordinance and the probable actual effect of the ordinance. Pet. App. 4a;

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[1] In addition, the ban exempts certain billboards, including those along interstate highways and in certain areas that are zoned for industrial or other specified business use.

Ct. App. J.A. 933. Instead, the district court granted the City's motion for summary judgment, holding that the ordinance satisfied the constitutional requirements for restrictions on commercial speech and that the ordinance was not preempted because it was not "based on smoking and health." *Id.* at 13a-45a.

2. The court of appeals affirmed. Pet. App. 1a-12a. Turning first to the preemption question, the court acknowledged that, according to the plain terms of the Act, a state law or municipal ordinance "based on smoking and health" must be set aside. The court nevertheless rejected the claim of preemption, finding it crucial that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a (emphasis in original). As a consequence, even though the City's counsel conceded at oral argument (Ct. App. Tr. 23) that the restriction on advertising was designed to advance public health goals, the panel concluded that the ordinance "neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*." *Ibid.* (emphasis in original).[2]

On the First Amendment issue, the court of appeals began by reciting the standard for reviewing restrictions on commercial speech: (1) "the speech must first concern lawful activity and not be misleading." *Id.* at 10a. If that threshold requirement is satisfied, the regulation survives First Amendment scrutiny "if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation 'directly advances the governmental interest asserted'; and (4) the regulation is not 'more

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[2] Significantly, the court of appeals did not accept the argument advanced in the City's brief that the ordinance was not based on health considerations because its drafters identified as its purpose the facilitation of compliance with a state law (which itself was based on health concerns) that precludes the sale of cigarettes to minors. To the contrary, the court acknowledged in its discussion of the First Amendment that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors." Pet. App. 10a. Indeed, the ordinance's preamble itself adverts to health concerns, and the debate leading to adoption of the ordinance was replete with references to the connection between smoking and health. See, *e.g.*, Ct. App. J.A. 461-463, 687, 690.

extensive than necessary' to serve the interest." *Ibid.*, quoting *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

The parties did not dispute that the restricted speech here is truthful and concerns lawful activity, and the court of appeals accepted the City's contention that the governmental interest in preventing the purchase and consumption of cigarettes by minors is substantial. Pet. App. 10a. Thus, in the court's view "[t]he principal dispute in this case center[s] on *Central Hudson*'s third and fourth prongs": whether the ordinance directly advances the stated government interest and whether it is narrowly tailored to advance that interest. *Id.* at 10a-11a. Elaborating on these standards, the court held that when the government defends a restriction on commercial speech it need not "'prove conclusively that [a] correlation [between the regulation and the governmental interest] in fact exists'"; instead, "'[t]he proper standard for approval must involve an assessment of reasonableness of the legislature's belief that the means it selected will advance its ends.'" *id.* at 11a, quoting *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir. 1995), cert. pending, No. 95-685 (reprinted at Pet. App. 46a-67a).[3] And while the court acknowledged that a restriction on commercial speech must be narrowly tailored, it concluded that the City need not "'abandon altogether an approach that directly advances its goal.'" *Id.* at 11a-12a, quoting *Anheuser-Busch*, 63 F.3d at 1316 (Pet. App. 63a).

Applying these standards here, the court of appeals upheld Ordinance 307. In doing so, the court made no attempt to determine whether the particular advertising restriction imposed by the ordinance would in fact have any effect on the use of cigarettes by minors, and it made no reference to the evidence offered by Penn to establish that advertising does not induce minors to smoke. Instead, noting its observation in the companion *Anheuser-Busch* case that certain studies had "linked alcohol advertising to underage drink-

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[3] The decision in *Anheuser-Busch*, upon which the court of appeals relied in this case, rejected a First Amendment challenge to a Baltimore ordinance that precludes liquor advertising on essentially the same set of signs as is involved in this case. Pursuant to this Court's Rule 14.1(i)(ii), the *Anheuser-Busch* opinion is reproduced in the Appendix.

ing," the court found a "'logical nexus'" between the City's goal and the ordinance's partial ban on cigarette advertisements. Pet. App. 11a (citation omitted). Similarly, the court found it unnecessary to address Penn's argument that the advertising ban was not narrowly tailored because it restricted only a limited subset of the advertising signs to which minors are exposed in the City, or because the City failed to consider alternative means of achieving its goal that did not limit speech (such as enhanced enforcement of laws barring the sale of cigarettes to minors). Instead, again by reference to its holding in *Anheuser-Busch*, the court simply observed that the fourth prong of *Central Hudson* was satisfied because there was no "'less restrictive means of screening outdoor advertising from minors.'" *Ibid.*, quoting *Anheuser-Busch*, 63 F.3d at 1316 (Pet. App. 63a).

REASONS FOR GRANTING THE PETITION

This case presents constitutional and statutory issues of substantial importance. The court of appeals' First Amendment analysis raises fundamental questions regarding the nature of intermediate scrutiny of restrictions on speech; the approach taken below essentially abdicates judicial responsibility in the area of commercial expression, deferring almost completely to any legislative judgment that is not manifestly irrational on the face of the legislative record. At the same time, the holding on preemption effectively nullifies an important provision of the Federal Cigarette Labeling and Advertising Act, scuttling a carefully crafted legislative compromise between proponents and opponents of restrictions on cigarette advertising — and in the process creating an intercircuit conflict.

These issues, moreover, are recurring ones of great practical significance. As is demonstrated by the Court's recent cases in the area — including *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140, cert. granted, 116 S. Ct. 35 (1995), which was argued on Nov. 1, 1995[4] — governments at all levels are attempting with increasing frequency to restrict commercial speech that addresses disfavored products or services, or that uses disfavored methods of communication. In particular, restrictions on cigarette advertising have been

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[4] As we explain below, the Court might wish to hold this case pending disposition of *44 Liquormart*.

enacted or are being considered by state and local governments across the nation.[5] Against this background, the decision below is sure to have a significant impact in shaping these legislative initiatives throughout the United States. Because that decision is deeply flawed, and because it is inconsistent with the holdings of this Court and creates a conflict among the courts of appeals, further review is imperative.

I. THE ORDINANCE CANNOT SURVIVE SCRUTINY UNDER THE FIRST AMENDMENT

The court of appeals' approach to the First Amendment quite plainly cannot be reconciled with this Court's decisions. The Fourth Circuit held that a restriction on commercial speech must be upheld so long as the enacting legislature rationally could have believed, on the basis of the materials it had gathered, that the restriction would advance important state interests; this Court, in contrast, has made clear that a court must apply its independent judgment, considering the record made in the judicial proceeding, in determining whether the requirements of the First Amendment are satisfied. Moreover, the Fourth Circuit held that there is no need for a showing that a restriction on commercial speech actually will advance its stated goals, let alone to a material degree; this Court has held repeatedly that just such a showing is necessary. And the Fourth Circuit rejected the argument that the ordinance is unconstitutionally underinclusive; this Court has found identical arguments to be persuasive. Because the

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[5] In 1994, Cincinnati, Ohio passed an outdoor advertising ban that is due to take effect in 1996. In 1994, Preston, Minnesota passed an ordinance banning most tobacco advertising in retail stores. Also in 1994, two local boards of health in Massachusetts adopted regulations banning all outdoor tobacco advertising and most tobacco advertising in retail stores. In addition, several public transit authorities have banned tobacco advertising on their facilities — *e.g.*, San Diego, California (1994) and Albany, New York (1993). A few cities have ended tobacco advertising on city-owned property — *e.g.*, San Francisco, California (1992) and New York, New York (1992). Utah banned tobacco advertising on billboards in 1921 as part of a broader Prohibition-era statute prohibiting the sale of cigarettes altogether (the sales ban was repealed in 1923). Bans on outdoor advertising of tobacco products have been proposed in Atlanta, Cleveland, Memphis, Pittsburgh, and San Francisco.

decision below is symptomatic of and will contribute to confusion about the proper standard for courts to apply in scrutinizing restrictions on commercial speech, this Court should grant review.

A. Courts Must Undertake Searching Judicial Review Of Restrictions On Commercial Speech

1. As the Court has had occasion to explain repeatedly in recent years, restrictions on commercial speech of the sort challenged here "threaten[ ] societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. * * * [T]he general rule is that the speaker and the audience, and not the government, assess the value of the information presented." *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993).[6] Indeed, "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995), quoting *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The importance of that consideration has led the Court to hold consistently that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See, *e.g.*, *Coors*, 115 S. Ct. at 1592-1593; *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084,

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[6] Similarly, content-neutral restrictions on non-commercial speech, which are subject to a searching "intermediate scrutiny" similar to that used to assess regulations of commercial expression (see *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2469 (1994)), "'can significantly impair the ability of individuals to communicate their views to others'" and thus impair the "'unfettered interchange of ideas.'" *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2045 n.13 (1994), quoting Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 57-58 (1987) (citation omitted). The Court has indicated that the test governing such restrictions is "very similar" to that applied to limits on commercial speech. *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993). See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). The approach adopted by the Fourth Circuit therefore has implications for a very broad range of expressive activity.

2088 n.7 (1994); *Edenfield*, 113 S. Ct. at 1800; *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993).

To effectuate these policies, the Court requires the government to demonstrate that its restriction satisfies what has become the familiar four-part test first stated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 566 (1980):

> [1] For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

2. The court of appeals correctly observed that the final two prongs of this test are principally at issue here, but it went fatally astray in its understanding of the government's burden in satisfying — and of the judiciary's role in applying — the *Central Hudson* test. In the Fourth Circuit's view, "'[i]f it appears to the [reviewing] court that the legislative body *could reasonably have believed* * * * that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.'" Pet. App. 6a (emphasis added), quoting *Anheuser-Busch*, 63 F.3d at 1311 (Pet. App. 54a). The court below therefore held that a reviewing court must find only

> "a logical nexus between the City's objective and the means it selected for satisfying that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. * * * The proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends."

Pet. App. 11a (emphasis added), quoting *Anheuser-Busch*, 63 F.3d at 1314-1315 (Pet. App. 60a). Thus, under the court of appeals' approach, while a party challenging a restriction on commercial speech may show that "'the legislature acted *irrationally*, it cannot subject legislative findings themselves to judicial review under a

clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to another.'" *Id.* at 6a-7a, quoting *Anheuser-Busch*, 63 F.3d at 1312 (Pet. App. 55a) (emphasis added).[7]

The Fourth Circuit's conclusion that a reviewing court is bound by the legislature's factual determinations — and is limited to asking whether the legislature acted "irrationally" — would be correct if restrictions on commercial speech were assessed under the lowest level of rationality review. See, *e.g.*, *FCC* v. *Beach Communications*, 113 S. Ct. 2096, 2102 (1993). But the court's approach entirely fails to recognize that the First Amendment standard applicable here

> is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the substantial fit we require.

Board of Trustees v. *Fox*, 492 U.S. 466, 480 (1988) (citations omitted).

As a consequence, in cases involving restrictions on speech the Court consistently has held that "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). A legislative determination thus "'does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution.'" *Id.* at 843-844, quoting *Whitney* v. *California*, 274 U.S. 357, 378-379 (1927)

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[7] The court of appeals elaborated on this conclusion in *Anheuser-Busch*, the companion decision to the one challenged here, explaining that a legislature's conclusions about the effect of its enactment "are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court." 63 F.3d at 1312 (Pet. App. 55a).

(Brandeis, J., concurring). In this inquiry, the Court must bring its "independent judgment" to bear. *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). See *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring). It could hardly be otherwise: if the court of appeals were correct that a legislature could insulate a restriction on speech from review simply by adverting to materials in the legislative record, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications*, 435 U.S. at 844. Indeed, in the specific context of commercial speech the Court has warned that without judicial scrutiny of the purported justification for a challenged restriction, "'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Coors*, 115 S. Ct. at 1592, quoting *Edenfield*, 113 S. Ct. at 1800. See *Ibanez*, 114 S. Ct. at 2092.

Against this background, this Court has not countenanced the limited judicial scrutiny of restrictions on commercial speech espoused by the court of appeals; instead, the Court has emphasized the importance of *searching* judicial review. "The state's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Ibanez*, 114 S. Ct. at 2089, quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). This burden "'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' * * * This requirement [is] critical * * *." *Coors*, 115 S. Ct. at 1592, quoting *Edenfield*, 113 S. Ct. at 1798, 1800.

Under this approach, a court cannot reject a First Amendment challenge by pointing to "anecdotal evidence and educated guesses" (*Coors*, 115 S. Ct. at 1593), or even to formal studies proffered by the government. See *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471-2472 (1994) (plurality opinion). Instead, it is "incumbent upon" a court "to go behind the legislative determination and examine for itself" the factual assumptions upon which the

restriction is based. *Landmark Communications*, 435 U.S. at 844. And while courts do not wholly disregard legislative judgments, particularly those that are predictive or discretionary in nature and therefore are not susceptible of empirical proof, that does not mean that such judgments "are insulated from meaningful judicial review altogether. On the contrary, we have stressed in our First Amendment cases that deference to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Turner Broadcasting*, 114 S. Ct. at 2471, quoting *Sable*, 492 U.S. at 129. Similarly, the requirement that the restriction on speech "will in fact alleviate the[ ] harms [targeted by the regulation] in a direct and material way" (*Turner*, 114 S. Ct. at 2470) obligates the court to look not only to the legislative record, but also to evidence presented in the judicial proceeding relating to the actual and anticipated operation of the restriction. See *Coors*, 115 S. Ct. at 1593; *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2375-2376 (1995); *Ibanez*, 114 S. Ct. at 2090 & n.10; *Edenfield*, 113 S. Ct. at 1801-1803; *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 95-96 & n.10 (1977).

3. The Court's application of these principles in its recent decisions establishes that close review of the materials actually relied upon by the legislature — as well as of the record evidence submitted by the party challenging a restriction on speech — is essential. In *Turner Broadcasting*, for example, the Court was unwilling to defer even to the most elaborate and detailed congressional findings, reversing a grant of summary judgment in the government's favor.[8] The case involved a challenge to the so-called "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. The statute was enacted after three years of hearings (see 114 S. Ct. at 2454) and contained "unusually detailed statutory findings" about the purported necessity for the challenged restrictions (*id.* at 2461); as in this case, the legislature relied on a study (in *Turner Broadcasting*, one prepared by the Federal Communications Commission) purportedly supporting the legislative conclu-

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[8] Although *Turner Broadcasting* involved noncommercial speech, the challenge was to a content-neutral restriction; that type of regulation is judged under an intermediate scrutiny standard very similar to that applicable to regulations of commercial speech. See note 3, *supra*.

sions. The Court nevertheless found the congressional findings insufficient to support the Cable Act's restrictions on speech.

The plurality held that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied" its burden of showing that the must-carry provisions would not burden more speech than necessary. 114 S. Ct. at 2470. In particular, the Court itself reviewed the FCC study and found it insufficiently probative (see *id.* at 2471), explaining that "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * * ." *Id.* at 2472.[9] See also *Coors*, 115 S. Ct. at 1592-1594 (refusing to defer to congressional judgment on effect of restriction on commercial speech).

Similarly, in *Edenfield* the Court invalidated Florida's ban on in-person solicitation of business by certified public accountants. The Court recognized that the interests asserted by the State were substantial. See 113 S. Ct. at 1799-1800. But the Court was unwilling to defer to the State's assertions about the necessity for and the effectiveness of its regulation. Instead, the Court conducted a searching examination of the record materials bearing on the effect of the challenged ban on speech. This independent examination of the evidence led the Court to find the restriction unconstitutional because the State "has not demonstrated that * * * the ban on CPA solicitation advances its asserted interests in any direct and material way." 113 S. Ct at 1800.

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[9] The section of the *Turner* opinion discussed here, 114 S. Ct. at 2470-2472, was joined by four members of the Court. Three others would have struck down the restriction outright, without need for further factfinding. See *id.* at 2479-2480 (O'Connor, J., joined by Scalia and Ginsburg, JJ., concurring in part and dissenting in part) (finding must-carry rules unconstitutionally overbroad because not narrowly tailored). Justice Stevens, who dissented from the plurality's "application of [the] standard," did not disagree with the principles announced. See *id.* at 2473 n.1 (Stevens, J., concurring in part and concurring in the judgment).

The Court took an identical approach in *Ibanez*, where it invalidated another Florida restriction on advertising by certified public accountants. The Court declined to defer to the "State's 'unsupported assertions,'" explaining that "'broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.'" 114 S. Ct. at 2089 (citation omitted). After concluding that the record materials did not support the State's assertions (see *id.* at 2090 n.10), the Court held that in the "'absence of evidence,'" the State's "'concern about the possibility of [harm] in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.'" *Id.* at 2090 (citation omitted).

The Fourth Circuit's holding is flatly inconsistent with this Court's approach. In the court of appeals' view, the factual premises that underlay a legislature's judgment are insulated from review, and a court may consider only whether the legislature reasonably could have believed that there was a logical nexus between the legislative means and ends. See page 8, *supra*. This Court, in contrast, has emphasized that a court must conduct its own meaningful and independent review to determine whether the legislative judgment is in fact adequately supported. The fundamental error committed below warrants this Court's attention.

4. In limiting itself to the legislative record and deferring to the legislative assessment of that record, the court of appeals may have been led astray by arguably imprecise language in several of this Court's opinions. In *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court upheld bans on advertisements of gambling,[10] explaining that "the Government obviously legislated on the premise that the advertising of gambling serves to increase demand for the advertised product." *Edge Broadcasting*, 113 S. Ct. at 2707. See *Posadas*, 478 U.S. at

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[10] In *Edge*, the challenged statute prohibited the broadcast of any lottery advertisement from a state that did not allow lotteries to be conducted. See 113 S. Ct. at 2701-2702. In *Posadas*, a Puerto Rico law prohibited Puerto Rico casinos from advertising their services to Puerto Rico residents. See 478 U.S. at 335-336, 340.

344. The court of appeals, citing in its *Anheuser-Busch* opinion to *Edge* and *Posadas*, understood the Court to have held in those decisions that a restriction on commercial speech will be upheld whenever "a logical correlation existed between the legislative objective and the means selected to achieve that objective." Pet. App. 59a.

The Fourth Circuit's decision reflects a basic misunderstanding of this Court's rulings. It was not contested in *Edge* or *Posadas* that the challenged advertising ban would reduce demand for the "product" advertised. Fairly read, however, neither case stands for the proposition that contrary evidence may be ignored — or that limited and gerrymandered advertising restrictions like those in Ordinance 307 may be presumed to affect demand. If that were the case, literally *any* restriction on advertising or labeling would be upheld without further scrutiny. That plainly is not the law, and any implication to the contrary in *Edge* and *Posadas* cannot survive the Court's most recent First Amendment decisions in *Coors*, *Edenfield*, and *Ibanez*. But the language in *Edge* and *Posadas*, if broadly read, nevertheless stands as a source of potential confusion for the lower courts; that makes it even more essential for this Court to clarify this area of the law.

B. The Court Of Appeals Misapplied The Third And Fourth Prongs Of The *Central Hudson* Test

1. *The "directly and materially advances" requirement.* The court of appeals' misunderstanding of the nature of intermediate First Amendment judicial scrutiny caused it to err in its application of the third and fourth prongs of the *Central Hudson* test. The third prong, of course, requires the government to "demonstrate that the restriction on commercial speech directly and materially advances" a substantial interest. *Went For It*, 115 S. Ct. at 2376. The Fourth Circuit held that, in satisfying this requirement, "'it is *not* necessary * * * to prove conclusively that the correlation [between the government's objective and the restriction on speech] *in fact exists*.'" Pet. App. 11a (citation omitted) (emphasis added). But that approach has been expressly and repeatedly rejected by the Court, which has labeled "critical" the requirement that "'a governmental body seeking to sustain a restriction on commercial speech * * * demonstrate that the harms it recites are real and that its restriction *will in fact*

alleviate them to a material degree.'" *Coors*, 115 S. Ct. at 1592 (citation omitted) (emphasis added).

As the holding below demonstrates, the court of appeals' departure from this Court's approach involves more than semantics; it led (and in the future will lead) to the validation of restrictions on speech that manifestly do not in fact serve any proper purpose. Indeed, this case provides a compelling example of the harm that flows from unduly relaxed judicial review. The record here provides no basis for concluding that the ordinance will have the slightest impact on underage smoking, let alone that it will materially advance the goal of reducing such activity. To be sure, the court of appeals cited studies characterized by the City Council as suggesting that there is a link between advertising *in general* and demand for cigarettes. See Pet. App. 3a-4a. That proposition was hotly disputed, however.[11] More particularly, speakers at the City Council's hearing on the ordinance noted that even the studies identified by the ordinance's supporters could not justify the speech restriction goal because they say nothing about the effect that *billboard* advertising has on smoking by *minors*. *E.g.*, Ct. App. J.A. 694, 703. The Fourth Circuit declined even to consider the specific criticisms and evidence presented to the City Council and demonstrating that the ordinance would not directly advance the City's goals to a material degree and would not be narrowly tailored.

Moreover, although the City did not offer additional evidence to the courts below to justify the ordinance under the *Central Hudson* test, Penn provided studies and affidavit evidence demonstrating that the ordinance in fact would *not* directly and materially advance the goals identified by the City Council, and that it was not narrowly tailored to achieve those goals. Penn thus put forward evidence that reducing advertising would have no effect on smoking — either in the general population or among minors. Ct. App. J.A. 1030-1117 (studies and reports). The 1987 Economic Report of the President, for example, concluded that cigarette advertisements serve principally to increase the advertiser's market share rather than overall de-

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[11] The validity of the studies cited by the City Council was called into question by some speakers at the Council's hearing on the ordinance. See, *e.g.*, Ct. App. J.A. 694.

mand for the product. *Id.* at 992, 1030-1035. The Report also concluded that bans on advertising do not reduce smoking and that advertising does not have a substantial effect on the rate at which children smoke. *Id.* at 991-994, 1035; see also 1040-1107. A study of tobacco advertising bans in other countries found that banning advertising has no effect on smoking rates. *Id.* at 1048. A paper reviewing the international experience with cigarette advertising bans (presented at the 1991 World Conference on Health Education) concluded that there is no basis to believe that such bans will either curtail tobacco consumption generally or reduce new smoking among minors. *Id.* at 1073. Finally, a review of the research on children, smoking and advertising determined that there is no reason to believe that banning advertising would diminish the number of minors who begin smoking. *Id.* at 1109. Without making *any* attempt to look behind this conflicting evidence regarding the effect of advertising on overall demand for cigarettes, it was impossible for the court below to find that the ordinance "will in fact" achieve its goals.

Perhaps more fundamentally, there is absolutely *no* evidence in the record (or anywhere else, so far as we are aware) that the billboard advertising barred by the ordinance increases smoking by any segment of the public, let alone minors. Indeed, one of the studies relied upon by the City addressed only advertisements found in newspapers and magazines, which are not affected by the ordinance. Ct. App. J.A. 858-859. Another considered students' perceptions of specific advertisements, but did not conclude that a ban on advertising would reduce adolescent smoking rates. *Id.* at 866-868. And needless to say, there is no evidence at all that a ban on billboard advertising for cigarettes will reduce demand when, as here, the municipality *permits* many cigarette advertisements elsewhere, including some (such as those on the exterior walls of retail establishments, at sports stadiums, and on buses) that are sure to be seen repeatedly by minors.

Even if the City's speculation (that reducing the number of cigarette advertising signs will reduce smoking by minors) were well-founded, any benefit from the ordinance would still depend on the conclusion that the ordinance will in fact reduce the number of such advertisements. But the record suggests that the ban will not even accomplish this goal. In his affidavit, Penn's General Manager described the wide variety and substantial number of non-billboard

cigarette advertisements that are unaffected by the ordinance; exhibits attached to the affidavit provided examples of those advertisements. Ct. App. J.A. 1122-1124, 1127-1147. In a particularly striking passage, he noted that: "MTA [buses] are used to transport thousands of Baltimore City students to school each day. Advertisements [for cigarettes] on MTA [buses] * * * are specifically exempted from [the ordinance]." *Id.* at 1122. He also described and provided examples of on-site store advertising, taxi advertisements, and newspaper advertisements. The City did not answer and the court below did not address this evidence. Indeed, the unrefuted evidence demonstrates that the primary effect of the ordinance's discrimination would be simply to impose economic punishment on billboard owners, such as Penn, and to benefit other advertising media, such as on-site locations, taxis and buses, and newspapers. *Id.* at 1121-1122, 1124-1125.

Against this background, the City has offered no proof that the ordinance "will in fact" reduce underage smoking "to a material degree." *Edenfield*, 113 S. Ct. at 1800. Nor is any such conclusion plausible. While there is no record evidence establishing how many retailers and others display cigarette advertising, it is certain that, in a city of Baltimore's size, there are *thousands* of locations at which cigarette advertising remains permissible. Furthermore, the City has failed entirely to show that the ordinance will produce *any* net reduction in the quantity of cigarette advertising to which youths are exposed, since cigarette manufacturers presumably could switch their advertising from billboards to other media that also incidentally reach children. See Ct. App. J.A. 1121-1124.

In sum, the argument relied on by the City is identical to that rejected by this Court in *City of Cincinnati* v. *Discovery Network, Inc.*, *supra*, where Cincinnati's attempt to serve safety and esthetic interests by banning certain newsracks was invalidated because it had "only a minimal impact on the overall number of newsracks on the city's sidewalks." 113 S. Ct. at 1511. In this case as well, there is no evidence that the effect of the ordinance on the volume of commercial speech for the targeted product will be anything other than minimal. To the contrary, for all that appears from the record,

the impact of the Baltimore ordinance will be no more substantial than that of Cincinnati's newsrack ban.[12]

None of this, of course, is to gainsay the importance of minimizing smoking by minors. As we have explained, however, there is reason to doubt that any advertising ban will reduce demand for cigarettes. And the patent inefficacy of the qualified restriction imposed by the City means that truthful commercial speech — speech that is presumptively valuable both to the speaker and to listeners (to adult smokers, if to no one else) — is being suppressed to no effect at all. Indeed, in the absence of proof that the ordinance in fact achieves its stated purpose, it is fair to infer that the City is restricting disfavored speakers or forms of speech "in the service of other objectives that could not themselves justify a burden on commercial suppression." *Edenfield*, 113 S. Ct. at 1800.[13] This Court should make clear that such an approach is impermissible.

2. *The "narrow tailoring requirement.* The court of appeals similarly departed from this Court's precedents in holding that the ordinance is narrowly drawn to produce a reasonable fit between the governmental objective and the means of achieving it. In reaching its conclusion, the Fourth Circuit held that the ordinance is not overbroad because there was no less restrictive means of screening outdoor advertising from minors. See Pet. App. 11a. Neither the City Council nor the court of appeals even considered the "obvious less burdensome alternatives to the restriction on commercial speech." See *Coors*, 115 S. Ct. at 1593-1594. For example, the court refused even to consider the possibility of additional law

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[12] Cincinnati's ban removed 62 newsracks while leaving 1500 to 2000 in place. 113 S. Ct. at 1510. The effect in Baltimore is likely to be comparable. See Ct. App. J.A. 1122-1123, 1128-1136 (examples of cigarette advertising on outdoor signs unaffected by Ordinance 307).

[13] Here, for example, it is possible that the City actually is not concerned with discouraging smoking at all, but instead wants to discourage use of billboards, or wants advertising revenue to be transferred from billboard owners to the operators of MTA buses and sports arenas. Limits on discovery imposed by the courts below — which believed that they needed to consider only the logical nexus between the City's stated means and ends — made it impossible for Penn to explore those possibilities.

enforcement efforts to improve compliance with existing (or new) laws or additional educational efforts to discourage minors from smoking. But entirely apart from the possibility of using alternative methods to advance the City's interest that would not involve the suppression of speech at all the court entirely disregarded this Court's admonition that problems of fit do not arise only from overbreadth. A regulation of speech also may be invalid if it is *underinclusive*.

In *Discovery Network*, the Cincinnati regulation invalidated by the Court, which ostensibly was designed to further the city's interest in safety and esthetics, prohibited newsracks used to distribute commercial fliers, while permitting newspaper newsracks. See 113 S. Ct. at 1508-1509. Observing that commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks" (*id.* at 1514), the Court held that "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It therefore is an impermissible means of responding to the city's admittedly legitimate interests." *Ibid.* (emphasis in original). The Court accordingly held that, "[b]ecause the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding * * * that the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*." *Id.* at 1516.

Precisely the same thing is true here. The legislative record falls far short of establishing that there is any meaningful difference between the signs affected by the ordinance, on the one hand, and the myriad advertisements permitted by the ordinance on buses and taxicabs, at the Camden Yards baseball stadium, and on the exterior walls of the innumerable retail establishments that sell cigarettes. The court of appeals offered no reason to believe — and there is absolutely no evidence establishing — that the approved signs are seen less often by minors or have less of an impact on demand for cigarettes than do the ones proscribed by the ordinance, which are located in the very same areas of the City. And just as the inefficacy of the ordinance suggests that it may advance a hidden purpose, so too the manifest underinclusiveness of the restriction on speech raises the inference that the City is serving other objectives that could not themselves justify a limit on commercial expression. In these cir-

cumstances, the ordinance plainly is invalid under the principle articulated in *Discovery Network*.

II. FEDERAL LAW PREEMPTS THE BALTIMORE ORDINANCE

The court of appeals' rejection of Penn's preemption argument also presents an issue calling for this Court's review. Review is essential because the decision below, if allowed to stand, will upset a complex and carefully balanced legislative compromise struck by Congress. In enacting the Act, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring cigarette packages (and later, cigarette advertisements) to carry health warnings specified by Congress. 15 U.S.C. § 1331. At the same time, Congress acted to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. *Id.*[14] To give effect to this policy of national uniformity, the Act expressly preempts any "requirement or prohibition based on smoking and health * * * imposed under State law with respect to the advertising or promotion of * * * cigarettes * * *." 15 U.S.C. § 1334(b). This provision "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State

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[14] The Congressional declaration of policy and purpose states:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
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> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

or local authority." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969). Baltimore's ordinance is clearly a prohibition of advertising within the scope of the Act, and as such is preempted.

As we have explained (at 5-6 & n.5, *supra*), restrictions on cigarette advertising like those in the ordinance have been adopted or are being considered by states and municipalities across the nation, including many of the country's largest cities. All of those restrictions have been, or are likely to be, challenged on preemption grounds. That makes it imperative for the Court to settle at the earliest possible date the scope of the Federal Cigarette Labeling and Advertising Act's preemption provision. And that is especially so because the Fourth Circuit's decision, which cannot be reconciled with a recent holding of the Second Circuit, has engendered considerable confusion in a heavily regulated and much-litigated area.

1. In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (plurality opinion), this Court held that the central preemption inquiry under the Act tracks the language of the statute: "whether the [predicate] legal duty * * * constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 524. Ostensibly applying this straightforward test, the Fourth Circuit reached the remarkable conclusion that the Act does *not* preempt the ordinance. This conclusion is irreconcilable both with the language of the Act and with the Court's holding in *Cipollone*.

The court of appeals began by stating that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a (emphasis in original). But the notion that the ordinance is a regulation only of "place and manner" (*id.* at 10a) is nonsensical, since Penn and other sign owners are being told what kinds of messages they may put on their signs. Indeed, the restriction on location is determined *entirely* by the sign's content. This Court consistently has viewed such restrictions as content based. See, *e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (prohibition on campaigning within 100 feet of polling place is content based because the right to speak "depends entirely on whether the[ ] speech is related to a political campaign"); *Consolidated Edison Co.* v. *Public Serv.*

Comm'n, 447 U.S. 530 (1980) (rule prohibiting utilities from using bill inserts to discuss political matters is a content-based restriction).

Nor did the Fourth Circuit make any attempt to explain why the distinction it drew (even if that distinction otherwise were intelligible) would have any significance under the preemption provision. In fact, the Act does not differentiate between restrictions directed to the content of cigarette advertisements and restrictions of any other sort. To the contrary, the scope of the preemption provision "reaches beyond statements 'in the advertising'" and instead preempts *all* state regulation based on health concerns "'with respect to the advertising or promotion' of cigarettes." *Cipollone*, 505 U.S. at 520 (plurality opinion). As this Court noted in *Cipollone*, when Congress amended the Act in 1969 it substantially broadened the preemption provision. *Ibid.* As originally enacted, the Act precluded state and local authorities only from requiring "any *statement* * * * relating to smoking and health in the advertising of cigarettes." 15 U.S.C. § 1334(b) (1965) (emphasis added). But the "obviously broader language of the 1969 version extended [the Act's] preemptive reach." *Cipollone*, 505 U.S. at 523 (plurality opinion). In its current form, the Act preempts *any* state or local "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion" of cigarettes.

The Fourth Circuit's inscrutable conclusion that the advertising restriction at issue does not "impose[ ] a duty [ ]or relieve[ ] a burden on cigarette advertisers based on smoking and health" is similarly without basis or explanation. Pet. App. 9a. To the extent it is germane, it is now undisputed that the City Council's enactment of the ordinance *was in fact* based on health concerns, as the City's counsel conceded at oral argument. See Ct. App. Tr. 23 (agreeing with Judge Butzner that the City Council enacted the ordinance out of its "concern[ ] with the health of children"). Indeed, the court of appeals itself acknowledged that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors," and health considerations were a central part of the finding of substantial governmental interest

underlying the panel's First Amendment analysis. Pet. App. 10a.[15] The ordinance thus obviously imposes a burden based on health concerns: it precludes an entire category of cigarette advertising. And by its plain terms, the Act unambiguously "[p]rohibits health-related regulation or prohibition of cigarette advertising." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969).

Finally, the court of appeals relied on its observation that the ordinance has the same "general relationship" to the health effects of smoking as do common law claims for breach of express warranty, fraudulent misrepresentation, and conspiracy, which the *Cipollone* Court held were not preempted by the Act. Pet. App. 9a. In so holding, however, the Fourth Circuit simply disregarded this Court's explanation that such claims "are not predicated on a duty 'based on smoking and health'" but rather on *independent* duties, such as the "duty not to make false statements" of material fact or to conceal such facts. *Cipollone*, 505 U.S. at 528-529. In contrast, of course, the City has conceded that the ordinance is predicated on the relationship between smoking and health. The ordinance is not like an anti-littering restriction that affects all advertising leaflets equally, including those advertising cigarettes, and that might be analogous to a general ban on misrepresentation; instead, it is a prohibition that targets cigarette advertising precisely because of the

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[15] As we note above (at note 2), the court of appeals pointedly did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors. Indeed, the Maryland statute referred to by the City is itself related to smoking and health (see Ct. App. J.A. 1013-1014), and insofar as the purpose of the ordinance is to encourage compliance with the state law, the ordinance must be understood to share the purpose of that law. If, moreover, the ordinance were intended both to serve health concerns and to foster compliance with state law, this Court has held that a state or local regulation is preempted by federal law so long as *one* purpose of the statute is impermissible. *Gade* v. *National Solid Waste Management Ass'n*, 505 U.S. 88 (1992) (state environmental regulation preempted despite the state's assertion of a non-preempted purpose in addition to preempted purpose); *Perez* v. *Campbell*, 402 U.S. 637 (1971) (state may not evade preemption by articulating some purpose other than preempted purpose).

perceived connection between, in the words of the Act, "smoking and health."[16] Preemption therefore is mandated by the Act.

2. The decision below also is of particular importance because it is directly at odds with a careful legislative compromise that lay behind passage of the Act in 1965 and the extension of its preemptive reach in 1969. Congress included the preemption provision in the original version of the Act in 1965 because it recognized that the states were eager to become involved in the regulation of cigarette labeling and advertising, and it was concerned about the effects of such state and local regulation upon "commerce and the national economy."[17] As the termination date of the 1965 Act approached, Congress determined to amend the Act to further protect "commerce and the national economy" from "the chaos created by a multiplicity

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[16] The common law claims that the Court allowed plaintiffs to pursue in *Cipollone* — claims for breach of express warranty and intentional misrepresentation or fraud — were held not to be preempted because, although they could be *applied* to statements made by cigarette manufacturers in their advertising, the duties giving rise to those claims were not themselves based on "smoking and health" but applied generally, regardless of what was being advertised: the justification for those duties was not a concern about the health effects of smoking. By contrast, the Baltimore ordinance is specifically focused on cigarette advertising and is premised on smoking and health concerns. Thus, the Fourth Circuit erred in supposing that the City's billboard advertising ban bore too "general" a relationship to smoking to be "based on smoking and health" within the meaning of the Act; there is simply nothing "general" about the ordinance. Moreover, the *Cipollone* Court emphasized that the common-law claims permitted by the decision would not conflict with Congress' policy of avoiding diverse, nonuniform, and confusing standards. 505 U.S. at 529. On the other hand, allowing each state and local jurisdiction to decide where and in what media cigarette advertisements may appear (in an asserted effort to prevent illegal transactions) brings about the disuniformity that Congress sought to avoid by the preemption provision. See *Sparks* v. *R.J. Reynolds Tobacco Co.*, No. C94-783C (W.D. Wash., Dec. 9, 1994), slip op. 9.

[17] See *Hearings on S. 559 and S. 547 Before Senate Committee on Commerce*, 89th Cong., 1st Sess. 39 (Surgeon Gen. Terry); S. Rep. No. 195, 89th Cong., 1st Sess. 4; 111 Cong. Rec. 14411 (June 22, 1965) (Rep. Springer).

of conflicting regulations." S. Rep. No. 566, 91st Cong., 1st Sess. 1, 12 (1969). In the face of renewed efforts at the state level to regulate or ban cigarette advertising (see *Cipollone*, 505 U.S. at 515 & n.11), Congress crafted a careful and balanced compromise. In addition to strengthening the warning label required on cigarette packages, the 1969 amendments banned cigarette advertising on radio and television. 13 U.S.C. § 1335. At the same time — and related to the ban on radio and television advertising (see *Cipollone*, 505 U.S. at 515) — Congress broadened the preemptive scope of the Act. Its express purpose in doing so was to ensure "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to *any relationship* between smoking and health." 15 U.S.C. § 1331 (emphasis added).[18]

The legislative history of the 1969 amendments demonstrates that Congress intended to preclude any state and local regulation targeted at cigarette advertising. Senator Magnuson, the Senate manager of the conference report, confirmed this interpretation in a colloquy with Senator Cooper in the final Senate floor debate on the conference report. To establish an authoritative interpretation of the legislation, Senator Cooper asked Senator Magnuson whether the Act "preempts the States from *any* action restricting [cigarette] advertising." 116 Cong. Rec. 6640 (1970) (emphasis added). Senator Magnuson's answer was an unequivocal "Yes." *Ibid.*

Any reading of the preemption provision that would permit state or local bodies to ban cigarette advertising — even in the guise of

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[18] *See also Cigarette Advertising and Labeling: Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 103 (1969) (Sen. Magnuson) (advertising issue is "a national matter"); *id.* at 120 (Sen. Goodell) (need for federal preemption "so you don't have to deal with State and local regulations"); *id.* at 130 (Vincent T. Wasilewski, National Association of Broadcasters) ("Congress should not permit unilateral action by the several States"); *id.* at 177 (Sen. Moss) ("This is a national problem and it must be dealt with on a national basis."); *Cigarette Advertising and Labeling: Hearing on H.R. 643, H.R. 1237, H.R. 3055, H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 16 (1969) ("this is the jurisdiction of this Congress and nobody else."); *id.* at 21 (Rep. McMillan); *id.* at 24, 225, 27, 30 (Rep. Fountain).

time, place, and manner restrictions, or in the guise of promoting compliance with other laws — would undermine the purpose of the carefully crafted political compromise embodied in the 1969 amendments: protecting "commerce and the national economy" to the "maximum extent" consistent with the policy of informing the public about the relationship between smoking and health. The Fourth Circuit's view of the Act would produce the very "chaos created by a multiplicity of conflicting regulations" that Congress sought to avoid.

3. Given the patent inconsistency of the decision below with *Cipollone* and the language of the Act, it comes as no surprise that the Fourth Circuit's approach has created an intercircuit conflict. In *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), a post-*Cipollone* decision of the Second Circuit, a company that displays advertisements on New York City taxicabs brought a challenge under the Act's preemption provision to a New York City ordinance that required city-licensed facilities to display at least one anti-smoking message for every four tobacco advertisements displayed. The Second Circuit held the New York ordinance preempted, rejecting many of the arguments raised by the City here.[19]

The Second Circuit was unpersuaded by New York's argument that the ordinance at issue was not one "with respect to the advertising or promotion of any cigarettes" because it "impose[d] no requirements or prohibitions on the content, format or display of cigarette advertisements * * * ." *Id.* at 73. As is true of the Baltimore ordinance, the Second Circuit acknowledged that under the New York City ordinance "the actual cigarette advertisements would not look different," and therefore might not have been preempted under the narrower provision of the 1965 Act. *Id.* at 74. The court found, however, that "the more expansive reach of § 1334(b), as clearly evidenced by its amended language [under the 1969 amendments],

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[19] The plaintiff in *Vango Media* also raised a First Amendment argument. But because the district court held the New York ordinance preempted, that court found it unnecessary to reach the First Amendment issue. And notwithstanding the "patent First Amendment problems with the Local Law" (*Vango Media*, 34 F.3d at 71), the Second Circuit also did not address the constitutional question.

precludes that result." *Id.* Thus, even though the ordinance "treads on the area of tobacco advertising * * * only at the edges * * * it implicates § 1334(b)." *Id.* at 74. In this case, the City has adopted a regulation that does far more than affect cigarette advertising "at the edges." Instead, Ordinance 307 prohibits an entire category of cigarette advertising outright, in an effort to promote public health. The Fourth Circuit's decision that such local regulation can co-exist with the Act is irreconcilable with the Second Circuit's holding in *Vango Media*.

New York also argued in *Vango Media* that the local law "was enacted in light of the economic costs related to smoking, and not on smoking and health considerations." 34 F.3d at 73. But the Second Circuit rejected the notion that it was bound by New York's characterization of the purpose of the ordinance. Instead, the court undertook its own examination of the local law's purpose and concluded that the City Council was motivated by a concern about the effects of smoking on public health. *Ibid.* The same is true here, and the result should be the same: the ordinance must be preempted. Further review therefore is warranted.

4. Finally, we note that the First Amendment issue in this case is similar to the one currently before the Court in *44 Liquormart*; if the constitutional question were the only one presented here, it would be appropriate for the Court to hold this case pending resolution of *44 Liquormart*.[20] But because the preemption claim presents a statutory ground for disposing of the case without the need for further proceedings — and because the meaning of the Act is itself an important issue that warrants this Court's early attention — the

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[20] The constitutional challenge presented here is considerably stronger than the one in *44 Liquormart*, however. The First Circuit's decision in that case to uphold a restriction on price advertising by liquor stores rested in substantial part on the Twenty-First Amendment (see 39 F.3d at 7, 8), a provision that has no bearing in this case. In addition, the court in *44 Liquormart* actually considered the evidence in the record, including that offered at trial by the plaintiffs (see *id.* at 7-8), and found that "there [was] no empirical evidence either way" regarding the effectiveness of the advertising restriction. *Id.* at 7. Here, of course, the court of appeals considered such evidence irrelevant.

Court may wish to grant review (at least of the preemption issue) without awaiting the disposition of *44 Liquormart*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE,

Amici Curiae.

No. 94-2141

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, Senior District Judge. (CA-94-877-HM)

Argued March 6, 1995.

Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, Circuit Judge:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on

"outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising p'ays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of

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[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the

Central Hudson test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiary record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the questions presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court noted in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, —, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by Central Hudson. We decided the same question in the companion case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch*:

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject

> legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.* at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone* v. *Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common

law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at ---, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at ---, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at ---, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at ---, 112 S.Ct. at 2622. *See also Vango Media, Inc.* v. *City of New York,* 34 F.3d

68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in Cipollone to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in Cipollone could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at ---- - ----, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp.1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc.* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when "'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.'" *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore* v. *Sitnick*, 254 Md. 303, 323,

255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307

directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States* v. *Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson's* third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying Central Hudson's third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson's* fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon

> altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PENN ADVERTISING OF BALTIMORE, INC.

v.

THE MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, ET AL.

Civ. No. HM-94-877.

Aug. 11, 1994.

MEMORANDUM

HERBERT F. MURRAY, Senior District Judge.

I. INTRODUCTION

Baltimore City Ordinance 307 (Council Bill No. 627) (hereinafter "Ordinance 307") was signed into law by Mayor Kurt L. Schmoke on March 7, 1994. This Ordinance prohibits cigarette advertising on billboards located in certain designated zones within Baltimore City. Plaintiff Penn Advertising of Baltimore, Inc. (hereinafter "Penn") is the owner of billboards located within these zones of prohibition. By its terms Ordinance 307 was to take effect on the 30th day after the date of its enactment. On the thirtieth day after enactment of Ordinance 307, Penn brought this action against defendants The Mayor and City Council of Baltimore, Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City, and David Tanner, in his official capacity as General Superintendent of Zoning Administration and Enforcement of Baltimore City (hereinafter collectively referred to as "the City"). Penn seeks injunctive and declaratory relief.

In its complaint, Penn states three separate grounds upon which it seeks judgment. Penn first claims that Ordinance 307 is in violation of the First Amendment's protection of free speech. Second, Penn claims that Ordinance 307 is pre-empted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act. Lastly,

Penn claims that Ordinance 307 is pre-empted by Maryland State law.

On April 26, 1994, in lieu of filing an answer to Penn's complaint, the City filed a Motion to Dismiss, or in the Alternative, for Summary Judgment.[1] Penn responded by filing a Memorandum in Opposition. After reviewing the parties' memoranda and exhibits, this Court has determined that no hearing is necessary and is prepared to rule on the merits of the City's motion.

II. MOTION FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure permits a grant of summary judgment only if no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The burden is on the moving party to demonstrate the absence of such issues of material fact. For the purposes of deciding the present motion, this Court must construe all facts and reasonable inferences in favor of the plaintiff. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

In opposition to summary judgment, however, a party must proffer more than "a mere scintilla of evidence" to raise a genuine issue of material fact. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. Although not weighing the evidence or determining the truth for the purposes of these motions, the Court must consider "whether reasonable jurors could find by a preponderance of the evidence that [the non-moving party] is entitled to a verdict." *Id.* at 249, 252, 106 S.Ct. at 2510, 2512.

Despite Penn's assertions to the contrary, this Court concludes, after careful review of the pleadings and exhibits, that there is no genuine dispute of material fact in this case, and that the questions presented by plaintiff's Complaint are legal questions ripe for decision by this Court.

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[1] Because the Court has considered matters outside of the pleadings, the Court will not rule on the City's motion to dismiss, but rather on the City's alternative motion for summary judgment.

While Penn asserts that the parties vigorously dispute factual matters, this is not so. The parties vigorously dispute questions of law and it is proper for this Court to decide these questions. There are no factual issues to be decided because this case concerns a facial attack on the legal sufficiency of an ordinance. An example of Penn's mischaracterization of legal issues as factual ones is Penn's statement that "it should at least be clear . . . that the question of whether Ordinance 307 is a prohibition or requirement based on smoking and health is something about which Plaintiff and Defendants sharply disagree." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 9. While the parties do disagree on this issue, that disagreement is not relevant to the determination of whether summary judgment is appropriate because it concerns a legal question which is properly decided by this Court. Similarly, Penn's memorandum contains lengthy legal arguments in support of each of Penn's claims. At the end of each of these legal arguments, Penn asserts that a dispute of fact is involved. But Penn does not direct this Court to any such factual disputes; rather, Penn simply argues the law. This Court finds that there are no genuine disputes of material fact present in this case. Therefore, the Court will rule on the legal issues presented in the parties' memoranda.

A. Ordinance 307 is Constitutional

While it is true that "the First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation," *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (citing *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761-762, 96 S.Ct. 1817, 1825-1826, 48 L.Ed.2d 346 (1976)), it is also well-settled that "commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

The appropriate test for assessing the constitutionality of restrictions on commercial speech was established by the Supreme Court in *Central Hudson*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351 (1980).

In the instant case, the parties agree that the advertising in question is neither unlawful nor misleading, thereby satisfying the first prong of the *Central Hudson* test. The parties vigorously dispute whether the ordinance complies with the second, third and fourth prongs of the test.

1. The Second Prong: Substantial government interest

In order to satisfy the second prong of the *Central Hudson* test, the City must demonstrate a substantial government interest which the City seeks to achieve by its promulgation of Ordinance 307. The asserted interest of the City, as stated in both its memorandum and in the Preamble to Ordinance 307, is to promote compliance with the state law prohibition against the sale of cigarettes to minors, Md.Ann.Code art. 27, § 404 (1992), thereby also furthering the obvious public policy underlying this prohibition which is to prevent the purchase, and thus the consumption, of cigarettes by minors. This is certainly a sufficiently substantial interest for the purposes of the *Central Hudson* test.

Article 27, § 404 of the Maryland Code declares that "it is unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). While, as Penn asserts, a minor does not commit an act expressly prohibited by § 404 by purchasing cigarettes, the person selling the cigarettes to a minor is committing an act expressly prohibited by this ordinance. Thus, if the number of minors seeking to purchase cigarettes decreases, the number of transactions in violation of § 404 will also decrease. Ordinance 307 represents a legislative

judgment by the Baltimore City Council that a reduction in the exposure of minors to stimuli encouraging the purchase of cigarettes will result in fewer minors seeking to purchase cigarettes and therefore fewer illegal transactions. Furthermore, the public policy behind § 404 of preventing the purchase, and thus the consumption, of cigarettes by minors would be advanced as well.

The City has a substantial interest both in promoting compliance with § 404 and in advancing the public policy which underlies § 404. Therefore, the second prong of the *Central Hudson* test is satisfied.

2. The Third Prong: Does Ordinance 307 directly advance this substantial interest?

In *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (holding that a Florida ordinance prohibiting Certified Public Accountants from in-person solicitation was an unconstitutional restraint on free speech), the Supreme Court elaborated upon the third prong of the constitutionality test for restrictions on commercial speech first set forth in Central Hudson. The Court stated that to withstand a First Amendment challenge, the state must demonstrate that "its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at —, 113 S.Ct. at 1799. The Court also cautioned that the state's burden

> is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.

Id. at —, 113 S.Ct. at 1800.

The City maintains that the Court's Edenfield ruling does not modify the "intermediate level"[2] of scrutiny that had been

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[2] The Court reaffirmed its view that an intermediate level of scrutiny is applicable to First Amendment challenges to restrictions on commercial speech in Discovery Network where the Court required a more searching inquiry than rational basis review, but one less rigorous than least restrictive means. *Cincinnati* v.

applicable to challenges to restraints on commercial speech prior to *Edenfield* and that the same deference should be afforded the legislature that had been prior to *Edenfield*. An example of this judicial deference is found in the deference the Supreme Court has given a legislature's judgment that a link exists between billboards and traffic safety in repeated litigation over the placement of billboards. In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), for example, the Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, stating that "[w]e likewise hesitate to disagree with the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509, 101 S.Ct. at 2893 (footnote omitted).

The City urges the Court to defer to the legislative judgment that the connection between advertising and consumption is "self-evident" as the Supreme Court and lower courts had done prior to *Edenfield*. *See, e.g., Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("The Puerto Rico Legislature obviously believed that advertising of casino gambling . . . would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one."); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales."); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (Deferring to a legislative judgment linking alcohol advertising and consumption in upholding a prohibition against the broadcasting of advertisements for alcoholic beverages); *Dunagin* v. *Oxford*, 718 F.2d 738 (5th

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Discovery Network, Inc., — U.S. —, — n.13, 113 S.Ct. 1505, 1510 n.13, 123 L.Ed.2d 99 (1993).

Cir.1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984) ("We hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban [on local liquor advertising], whether or not 'concrete scientific evidence' exists to that effect.").

Penn asserts that the Supreme Court's opinion in *Edenfield* has altered the level of scrutiny with which the Court is to examine a restraint on commercial speech. According to Penn, the Court should no longer apply an intermediate level of scrutiny. Penn asserts that after *Edenfield*, the City must satisfy "a serious and substantial burden of proof . . . that requires a fact-intensive inquiry that cannot be resolved through summary judgment." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 25. Under this more difficult test, Penn asserts that it is inappropriate for this Court to accept the judicially-recognized proposition that advertising increases consumption as sufficient to sustain the City's burden and thus that it is inappropriate for this Court to grant the City's motion for summary judgment.

Penn raised substantially the same argument in *Anheuser Busch, Inc. and Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 855 F.Supp. 811 (D.Md.1994) (hereinafter *Penn I*). *Penn I* involved a First Amendment challenge to an ordinance very similar to Ordinance 307, except the ordinance challenged in *Penn I* prohibited alcohol advertising on billboards located in areas that would cause minors to be exposed to such advertising, whereas Ordinance 307 prohibits cigarette advertising on similarly-situated billboards. Judge Hargrove in *Penn I* did not accept the increased level of scrutiny for commercial speech restrictions which Penn asserted makes it inappropriate for the Courts to defer to a legislative judgment that advertising increases consumption. Rather, Judge Hargrove concluded that *Edenfield* did not change the requisite level of scrutiny:

> This Court . . . is unable to find any language in *Edenfield* that specifies the precise level of scrutiny with which this Court must review the Ordinance. *Edenfield* requires only that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Penn I, 855 F.Supp. at 815 (quoting *Edenfield*, — U.S. at —, 113 S.Ct. at 1800). This Court finds Judge Hargrove's analysis persuasive.

In *Penn I*, Judge Hargrove relied on *United States* v. *Edge Broadcasting Co.*, — U.S. —, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), a Supreme Court decision that followed soon after the Court's *Edenfield* decision, to support his position. In *Edge*, the Court upheld a federal statute prohibiting radio broadcast of lottery advertising by licensees located in non-lottery states against a First Amendment challenge to restrictions on commercial speech. In doing so, the Court "affirmed the role of judicial deference to legislative judgments in the area of commercial speech." *Penn I*, 855 F.Supp. at 815. The Court acknowledged the propriety of judicial deference to a legislative judgment that advertising increases consumption, stating that

> Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.

Edge, — U.S. at —, 113 S.Ct. at 2707.

Penn cites *Cal-Almond, Inc.* v. *United States Dep't of Agric.*, 14 F.3d 429 (9th Cir.1993) (holding that a governmental program that required individual almond growers to pay assessments for government-sponsored advertising was an unconstitutional restriction on commercial speech), *Coors Co.* v. *Bentsen*, 2 F.3d 355 (10th Cir.1993) and *Hornell Brewing Co.* v. *Brady*, 819 F.Supp. 1227 (E.D.N.Y.1993), in support of their assertion that the federal courts that have recently been presented with this issue have refused to follow the judicially-recognized principle that advertising increases consumption. Despite Penn's contentions, none of these cases actually support this proposition.

Judge Hargrove in *Penn I* actually cited *Cal-Almond* in support of the opposing position. In *Cal-Almond*, the Ninth Circuit considered the impact of the recent Supreme Court decisions

involving commercial speech on *Central Hudson* and concluded that it was still appropriate to adhere to the judicial recognition that a link exists between advertising and consumption. While acknowledging the Court's general instruction in *Edenfield* to evaluate the government's interests and the harms it seeks to avoid, the Court noted that "the Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . . Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand." *Cal-Almond*, 14 F.3d at 439 (citations omitted).

While the Court went on to complete a more searching inquiry into the success of the Board's advertising efforts, the Court did so because the issue presented was not merely whether the Board's advertising efforts had increased demand. Rather, the relevant issue, whether "the generic Board promotion . . . sells almonds more effectively than the specific, targeted marketing efforts of individual handlers," required the Court to "compare it [the increase in demand caused by the Board's promotional campaign] to a situation where handlers spent their assessments on their own marketing." *Id.* at 439.

In *Coors*, the Tenth Circuit held that a regulation prohibiting statements of alcohol content on malt beverage labels violated the First Amendment. The government contended that the purpose of the regulation was to prevent strength wars among competing manufacturers. In invalidating the regulation, the Court noted that "[t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars." *Coors*, 2 F.3d at 358. The Court found that

> the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars . . . . Instead, it has offered only inferential arguments that are based on mere speculation and conjecture.

Id. at 359. Judge Hargrove noted that the link the government sought to establish in *Coors* "is, at best, tenuous." *Penn I*, 855 F.Supp. at 817.

In *Hornell*, the Court held that legislation prohibiting the use of the name "Crazy Horse" on alcoholic products was in violation of the First Amendment's protection of commercial speech because it did not directly advance the government's substantial interest in preventing the enhanced appeal of alcohol use among Native Americans. The government's argument was "based on the premise that the use of the name Crazy Horse will stimulate demand for malt liquor in Native American Communities." *Hornell*, 819 F.Supp. at 1235. While the Court refused to defer to the legislature's judgment and accept the government's premise without evidence to support it, the Court was careful to distinguish *Hornell* from *Posadas*, noting:

> Furthermore, in *Posadas*, the Court was able to defer to the legislature on the basis of precedent . . . that established the causal relationship between advertising and consumption . . . . Here, there is no comparable precedent that suggests, let alone establishes, an immediate connection between the use of one specific Native American name, Crazy Horse, and increased consumption of alcohol by Native Americans. The government asks the Court to make a leap of faith and logic on this point.

Id. at 1237.

The situations presented in *Cal-Almond*, *Coors* and *Hornell* differ greatly from the one currently before this Court. In *Cal-Almond*, the government sought to show, not merely that advertising increases consumption, but that "a government agency is better at marketing [almonds] than an individual business person." *Cal-Almond*, 14 F.3d at 439. In *Coors*, the government sought to establish a link between factual statements of alcohol content on malt beverage labels and strength wars. In *Hornell*, the government sought to establish a link between use of the name Crazy Horse and enhanced demand for malt liquor in Native American Communities. In all three cases, the government sought to establish a proposition that was, at best, tenuous. In all three cases the government asked the Court to accept mere speculation and conjecture as sufficient to satisfy their *Central Hudson* burden of demonstrating that the regulation in question directly advanced the asserted substantial governmental interest. In the case currently before this Court, the City urges this Court to accept the

proposition that advertising increases consumption. This link is "more immediately apparent," *Penn I*, 855 F.Supp. at 817, and is a long-standing, judicially-recognized proposition. *See, e.g., Posadas*, 478 U.S. at 342, 106 S.Ct. at 2977; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Dunagin*, 718 F.2d 738; *Edge*, — U.S. —, 113 S.Ct. 2696.

Penn also asserts that it is inappropriate to accept the judicially-recognized proposition that advertising increases consumption because the purpose of cigarette advertising is not to increase overall consumption but merely to increase the advertiser's market share of an already established pool of smokers. Penn also raised this argument in *Penn I* as it relates to alcohol. Judge Hargrove did not find Penn's position persuasive and adequately addressed their argument in *Penn I*. His reasoning regarding the market share argument is as applicable to cigarette sales as it is to alcohol sales.

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what business person stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society.

Penn I, 855 F.Supp. at 818 (quoting *Dunagin*, 718 F.2d at 749).

This Court holds that it remains appropriate in the wake of *Edenfield* to accept the judicially-recognized proposition that advertising increases consumption. Furthermore, if advertising increases consumption among the general population, it is also reasonable to accept the proposition that advertising increases consumption among youths. If anything, this statement may be more applicable to the youthful population than to the adult population due to the impressionable nature of youngsters.

As the Supreme Court reasoned in *Edge*, an opinion in which the Court accepted the legislative judgment that advertising increases consumption,

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising . . . . In our view, the restriction . . . directly advances the governmental interest within the meaning of *Central Hudson*.

Edge, — U.S. at —, 113 S.Ct. at 2707. Similarly, if there is an immediate connection between advertising and demand among minors, as has already been established, and Ordinance 307 decreases cigarette advertising, as it does, it stands to reason that the demand for cigarettes among minors will decrease. If the demand for cigarettes among minors decreases, the City's policy of preventing transactions which violate § 404 and discouraging the purchase and consumption of cigarettes by minors is advanced. Thus, Ordinance 307 does directly advance the City's asserted substantial interest and passes the third prong of the *Central Hudson* test.

3. The Fourth Prong: Is Ordinance 307 narrowly tailored to serve the City's asserted substantial interest?

In *Board of Trustees* v. *Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court explained that the fourth prong of the *Central Hudson* test requires only a reasonable fit between the regulation and the interest it is meant to serve for the challenged regulation to pass constitutional muster:

> What our decisions require is a "fit" between the legislature's ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental

> decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (internal quotations and citations omitted).

In declining to impose a "least restrictive means" requirement, the Court noted that in doing so it was taking "account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires" and providing "the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to government regulation.'" *Id.* at 481, 109 S.Ct. at 3035 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 455-56, 98 S.Ct. at 1918-19). In *Penn I*, Judge Hargrove explained that "[a]n intermediate level of scrutiny thus recognizes the latitude that decisionmakers require to address widespread social problems." *Penn I*, 855 F.Supp. at 819.

In *Edenfield*, the Court further elaborated upon why a reasonable fit requirement is appropriate. The Court reasoned:

> Commercial speech . . . is linked inextricably with the commercial arrangement that it proposes, . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. . . . For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

Edenfield, — U.S. at —, 113 S.Ct. at 1798.

Penn asserts, as it did in *Penn I*, that Ordinance 307 is not narrowly tailored to serve the City's substantial interest in preventing the purchase and consumption of cigarettes by minors. Penn argues that Ordinance 307 is underinclusive because it prohibits only a small percentage of total advertisements for the product, leaving many other mediums, such as newspapers, magazines, signs inside stores which sell cigarettes, advertisements on the storefronts of businesses that sell cigarettes and on the inside and outside of MTA busses, unrestricted. Penn cites *City of Cincinnati* v. *Discovery Network, Inc.*, — U.S. —, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), in support of this contention.

In *Discovery Network*, the Supreme Court invalidated a city ordinance because no reasonable fit existed between the regulation and the city's asserted interest. Motivated by its concern for safety and aesthetics, the city used a pre-existing ordinance, which prohibited distribution of "commercial handbills" on public property, to remove 62 newsracks containing commercial handbills while leaving between 1,500 and 2,000 similar newsracks that contained noncommercial speech untouched. The Court held that there was no reasonable fit because the city offered no legitimate justification for distinguishing between the newsracks that contained commercial speech and those that contained noncommercial speech. As the Court explained,

> the city's primary concern . . . is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.

Discovery Network, — U.S. at —, 113 S.Ct. at 1514. The only justification the city offered for this differentiation between newsracks was the fact that commercial speech receives a somewhat lower level of First Amendment protection than noncommercial speech. The city argued that this fact alone allows the prohibition of commercial speech while allowing noncommercial speech that is equally harmful to the city's asserted interest to remain untouched. In response to this argument, the Supreme Court stated:

> the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems. In Bolger, however, in rejecting 'offensive' speech, [we] specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.

Discovery Network, — U.S. at —, 113 S.Ct. at 1515 (internal quotations and citations omitted). The Court further elaborated on this point, stating: "the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly

legitimate interests." *Discovery Network*, --- U.S. at ----, 113 S.Ct. at 1514.

In the instant case, there are legitimate justifications related to the city's substantial interest for distinguishing between billboards and the other types of mediums which the ordinance does not affect. The distinction between the permitted and prohibited forms of advertising rests on the effect that different mediums have on adolescents.

Judge Hargrove in *Penn I*, in describing the very same billboards that are the subject of this litigation, stated:

> a billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Furthermore, despite protestations to the contrary, the reality is that billboard advertisements for alcoholic beverages focus on depressed inner-city neighborhoods. Billboards are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them thereby enhancing the attractiveness of the advertised product.

Penn I, 855 F.Supp. at 822. Judge Hargrove's insights are equally applicable to cigarette advertising on these same billboards. Relying on *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), which held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives was in violation of the First Amendment, Penn argues that the City "cannot deprive adults of commercial information concerning cigarettes simply because the City believes that minors should not be exposed to such information." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 44.

Penn advanced the same argument as it relates to alcohol advertisements in *Penn I*. Judge Hargrove concluded in *Penn I* that Penn's argument had no merit. This Court finds his reasoning persuasive. Judge Hargrove addressed Penn's argument by noting that:

> In *Bolger*, however, the Supreme Court recognized that the governmental interest in protecting children may in some

> instances justify special treatment. Citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726 [98 S.Ct. 3026, 57 L.Ed.2d 1073] (1978), which upheld a restriction on broadcasting in order to protect children, the Court emphasized the narrowness of the holding based on the uniquely pervasive and accessible nature of the broadcasting medium. In distinguishing *Bolger* from *Pacifica*, the Court found that the receipt of mail is far less intrusive and uncontrollable than broadcasting. The Court noted that parents already exercise substantial control over mail once it enters their mailboxes and are entitled under a federal statute to limit their receipt of sexually provocative material. Therefore, an additional regulation prohibiting unsolicited advertisements on contraceptives was unnecessary.

Penn I, 855 F.Supp. at 820 (internal quotations and citations omitted).

Judge Hargrove went on to note that "As in the broadcasting context, parents are similarly unable to control their children's exposure to outdoor billboard advertisements." *Id.* at 820. As the Supreme Court explained in *Packer*,

> There is a difference which justifies the classification between display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class by themselves . . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed . . . .' The legislature may recognize degrees of evil and adapt its legislation accordingly.

Packer Corp. v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274-75, 76 L.Ed. 643 (1932) (citing *State* v. *Packer Corp.*, 77 Utah 500, 297 P. 1013, 1019 (1931)). Thus, there is a legitimate justification relating to the City's asserted interest for differentiating billboards from other types of media which are less accessible to children and to which parent's can control their children's exposure, media such as newspapers, magazines and signs inside stores which sell cigarettes.

There is also a legitimate reason in line with the City's asserted interest for differentiating between the restricted billboards and advertisements on the storefronts of businesses that sell cigarettes. The Supreme Court addressed this issue in *Discovery Network* in their discussion of *Metromedia*. The Court explained that "the offsite-onsite distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations." *Discovery Network*, --- U.S. at ---- n. 20, 113 S.Ct. at 1514 n.20 (internal quotations and citations omitted). In rejecting a similar argument, the Fifth Circuit in *Dunagin* stated "the restrictions permit certain types of informational advertising of use to the consumer . . ., but bar those displays that it believes will encourage excess consumption." *Dunagin*, 718 F.2d at 751. The reasoning of the Supreme Court and the Fifth Circuit also applies to the case now before this Court. The City seeks to prevent the exposure of minors to advertisements that will increase their demand for cigarettes. They do not seek to hide the locations of establishments that sell cigarettes, thereby placing obstacles in the way of adult smokers seeking to purchase cigarettes and harming local businesses. The restriction on billboard advertisements substantially promotes the City's goal by banning a particularly large and attention-attracting medium that the City believes will stimulate demand among minors. Ordinance 307 accomplishes this while not unnecessarily interfering with local businesses or adult smokers by prohibiting the smaller on-site advertisements that likely have less influence on youngsters and serve a commercial and public interest by informing adult smokers of where cigarettes may be purchased.

As the Supreme Court stated in *Edge*:

> Nor do we require that the government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge, — U.S. at —, 113 S.Ct. at 2707. Therefore, this Court would not find Ordinance 307 unconstitutional even if several of the unrestricted mediums of which Penn complains were not easily distinguishable from billboards because the City need not make progress on all fronts before attempting to make progress on any. Furthermore, the government has made progress on other fronts more similar to billboard advertising than the unrestricted mediums. This can be seen in the Public Health Cigarette Smoking Act of 1969, 15 U.S.C.A. § 1335 (1970), which prohibits cigarette advertising on any medium of electronic communication, and in Executive Order No. 01.01.1993.33 signed by Governor Schaefer on December 20, 1993, Md.Reg., Vol. 21, Issue 1, pg. 14 (Jan. 7, 1994 issue), which prohibits the renewal of contracts for cigarette advertisements on MTA busses. In banning cigarette advertisements on television, radio and MTA busses, these restrictions place prohibitions on similar types of mediums to the billboards restricted by Ordinance 307. All of the restricted mediums are unusually accessible to and influential on minors and parents lack control over their children's exposure to each.

Penn also claims that Ordinance 307 is underinclusive because the restrictions on billboard advertising will only lead to an increase in cigarette advertising in the mediums remaining unrestricted, thus frustrating the City's asserted purpose of decreasing the exposure of minors to cigarette advertising. The Court is not persuaded by this argument. Penn has given no reason to accept this proposition beyond its unsubstantiated assertion. Even if the Court were to accept Penn's proposition, the City's asserted substantial interest would still be forwarded unless the advertising budget of tobacco companies shifted its focus from billboards to unrestricted mediums that are as accessible to and influential on minors as billboards and to which parents similarly have little control over the exposure of

their children. With the bans on advertisement in the electronic media and on MTA busses, it seems most improbable that such a hypothesized shift would increase advertising in such areas.

Penn further argues that Ordinance 307 fails to satisfy the fourth prong of the *Central Hudson* test because alternative, less burdensome means exist to decrease the purchase and consumption of cigarettes by minors, such as increased enforcement of the existing prohibition of cigarette sales to minors. But as Judge Hargrove stated in *Penn I*:

> The mere suggestion of alternatives, however, does not conclusively establish that the City's chosen means are not narrowly tailored; a reasonable fit is all that is necessary: 'A judge need not agree with the decisionmaker as to the most appropriate method for promoting a governmental interest; as long as there is a reasonable fit between the restriction and the interest served, the manner of regulation is left to the decisionmaker.' In other words, although consideration of alternatives is an element of 'reasonable fit,' it is not dispositive.

Penn I, 855 F.Supp. at 819 (quoting *Destination Ventures* v. *F.C.C.*, 844 F.Supp. 632, 638 (D.Or.1994) (citations omitted)). This Court holds that the City's chosen means are narrowly tailored to advance the City's asserted interest of decreasing the exposure of minors to stimuli that would encourage them to purchase cigarettes, thereby decreasing the number of illegal transactions and discouraging the purchase and consumption of cigarettes by minors. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[3] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements, while leaving

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[3] The eleventh exception to Ordinance 307 makes the ordinance inapplicable in the zoned areas described above.

other mediums, such as newspapers, magazines, and signs inside licensed premises, which do not cause these specific problems, unrestricted. Also left unrestricted are signs outside premises which sell cigarettes, thus allowing licensed distributors of cigarettes to identify themselves and their wares. For all these reasons, this Court holds that Ordinance 307 satisfies the fourth prong of the *Central Hudson* test.

Having determined that Ordinance 307 has satisfied all four prongs of the *Central Hudson* test, this Court holds that Ordinance 307 does not violate the First Amendment. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

B. Ordinance 307 is not pre-empted by the Federal Cigarette Labeling and Advertising Act

1. Pre-emption Analysis: Generally

Article VI of the Constitution provides that the laws of the United States "shall be the supreme law of the land; any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus, since the Supreme Court's decision in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with Federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). Pre-emption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, "'the purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)).

The Supreme Court further elaborated upon the proper approach to issues arising under the Supremacy clause in its opinion in *Cipollone* v. *Liggett Group, Inc.*:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law

> is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Cipollone v. *Liggett Group, Inc.*, — U.S. —, —, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (internal quotations and citations omitted).

2. History of the Federal Cigarette Labeling and Advertising Act

The Surgeon General convened an advisory committee in 1962 to examine the issue of whether there was a link between smoking and illness. In 1964, the advisory committee issued its report, which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Educ. and Welfare, U.S. Surgeon General's Advisory Comm., Smoking and Health 33 (1964). Following this report, the Federal Trade Commission (FTC) and several states separately moved to regulate the advertising and labeling of cigarettes. *See, e.g.*, 29 Fed.Reg. 8325 (1964); 1965 N.Y.Laws, ch. 470; *see also* 111 Cong.Rec. 13900-13902 (1965) (statement of Sen. Moss).

This activity led Congress to enact the Federal Cigarette Labeling and Advertising Act (FCLAA) in July 1965. Pub.L. 89-92 (1965), 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340 (hereinafter the "1965 Act"). In Section 2, the 1965 Act declared its competing dual purposes: (1) adequately informing the public that cigarette smoking may be hazardous to your health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations. Pub.L. 89-92, § 2 (1965), 79 Stat. 282, as amended, 15 U.S.C. § 1331(2). In furtherance of its first purpose, the 1965 Act required the warning statement "Caution: Cigarette Smoking May Be Hazardous to Your Health" on cigarette packages. Pub.L. 89-92, § 4 (1965), 79 Stat. 283. In recognition of its second purpose, the 1965 Act explicitly preempted FTC and state regulation by specifying that "no statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package," and that until July

1, 1969, "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at §§ 5, 10.

The *Public Health Cigarette Smoking Act of 1969*, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340, (hereinafter the "1969 Act"), strengthened the warning label, changing the warning message to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health," and prohibited cigarette advertising on television and radio. In addition, the pre-emption clause of the statute was changed to its present form: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub.L. 89-92, § 5(b) (1965), 79 Stat. 283 (codified at 15 U.S.C. § 1334(b)).

Federal cigarette labeling and advertising regulation reached its present form through the *Comprehensive Smoking Education Act*, Pub.L. 98-474, 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1331-1341) [hereinafter the "1984 Act"]. This act changed the warning format to a rotation of four different warning messages and extended the warning requirement to cigarette advertisements.

3. Analysis

The Supreme Court first addressed the question of the pre-emptive reach of the FCLAA in *Cipollone* v. *Liggett Group, Inc.*, — U.S. —, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). In *Cipollone*, the son of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984, attempted to recover damages for her death from the defendant cigarette manufacturers on the basis of several state common law claims. Cipollone claimed that the defendants had breached express warranties contained in their advertising, failed to warn consumers about the hazards of smoking, fraudulently misrepresented those hazards to consumers and conspired to deprive the public of medical and scientific information about smoking. Defendants argued that the state law claims were pre-empted by the FCLAA. The Court held that the 1965 Act did not pre-empt any of Cipollone's claims. The plurality

held that the 1969 Act pre-empted Cipollone's claims that were based on a failure to warn and the neutralization of federally mandated warnings to the extent such claims relied on omissions or inclusions in the tobacco manufacturer's advertising while not pre-empting those claims that were based on express warranty, intentional fraud and misrepresentation, or conspiracy theories.

In order for the *Cipollone* Court to rule, the Court necessarily undertook a thorough analysis of the pre-emptive reach of the 1965 and 1969 Acts. While the 1969 Act broadened the pre-emptive reach of the 1965 Act, *Cipollone*, at ––– - –––, 112 S.Ct. at 2619-21, the 1984 Act did not alter the 1969 Act with respect to pre-emption. Thus, the pre-emptive scope of the FCLAA has not changed since the 1969 Act. Therefore, the Court's discussion of the pre-emptive scope of the 1969 Act establishes the relevant standard of inquiry for the instant case. This is the only portion of the Court's analysis that is germane to the instant case.

In arriving at its conclusions concerning whether Cipollone's claims were pre-empted, the Court held that "the pre-emptive scope of the . . . 1969 Act is governed entirely by the express language in § 5 of [the] Act." Id. at –––, 112 S.Ct. at 2618. The Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the . . . [Act] offer no cause to look beyond § 5 of [the] Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Id. at –––, 112 S.Ct. at 2618.

The Court further elaborated on the standards for considering the pre-emptive power of § 5(b) of the 1969 Act: "we must fairly

but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted." *Id.* at —, 112 S.Ct. at 2621. Justice Stevens, with the support of a plurality of the Court, explained that the applicable inquiry in determining whether a claim is pre-empted by the 1969 Act is

> whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law . . . with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading. . . . [E]ach phrase within that clause limits the universe of common law claims preempted by the statute.

Id. at —, 112 S.Ct. at 2621.

Now that the applicable standards of inquiry into the pre-emptive scope of the 1969 Act, as dictated by the Supreme Court in *Cipollone*, have been established, this Court may now analyze the claims before it. Penn claims that Ordinance 307, a prohibition imposed under State law which regards advertising, is based on smoking and health and is therefore pre-empted by the FCLAA. Penn arrives at this conclusion on three bases. First, Penn argues that Article 27, § 404 is based on smoking and health because the precursor to § 404, an 1886 Maryland law banning sale of cigarettes to minors, recites that it is an "AN ACT TO PROTECT THE HEALTH AND MORALS OF MINORS . . . ." The City asserts that Ordinance 307 was promulgated with the purpose of further effectuating § 404. Penn argues that because § 404 is based on smoking and health, an ordinance meant to further § 404 is also based on smoking and health.

Even if this Court were to accept Penn's assertion that § 404 is based on smoking and health,[4] this Court would still not accept

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[4] The language of the preamble to the 1886 Act may well be nothing more than a statement of legislative authority. The "health and morals" formulation is one which is routinely used by legislatures in invoking state police powers. There is no legislative history available to determine whether health concerns were in fact

Penn's argument. The underlying purpose of § 404 is irrelevant to this analysis. The validity of § 404 has not been challenged, nor could it be challenged. It is certainly within the City's power to pass a law meant to effectuate a valid State law.

It is clear that Ordinance 307 is such a law. The purpose of Ordinance 307 is to further effectuate § 404, a valid State law. The Preamble to Ordinance 307 cites § 404 as the impetus for its promulgation along with abundant statistics concerning the prevalence of underage smoking to demonstrate the necessity of Ordinance 307 as a means to increase the effectiveness of § 404. Furthermore, Ordinance 307 is obviously designed to accomplish this goal. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[5] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements. Ordinance 307 has no effect upon other mediums which do not cause these specific problems, such as newspapers, magazines, and signs inside licensed premises. Ordinance 307 is clearly aimed at the illegal sale of cigarettes to minors. Its purpose is to effectuate § 404 and, therefore, Ordinance 307 is not "'based on smoking and health . . .' giving that clause a fair but narrow reading." Id. at —, 112 S.Ct. at 2621.

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an issue in first enacting the ban on sale of cigarettes to minors. It is clear, however, that "[a]lthough physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. *Cipollone* at —, 112 S.Ct. at 2615 (citing U.S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 years of Progress 5 (1989).

[5] See note 3.

This holding is in line with the holding of the Supreme Court in *Cipollone*. In *Cipollone*, the Court held that Cipollone's claims of intentional fraud and misrepresentation were not pre-empted because they were not "'based on smoking and health' but rather on a more general obligation— the duty not to deceive." *Id.* at —, 112 S.Ct. at 2624. The Court further held that Cipollone's conspiracy claim was not pre-empted because "this duty . . . is not a prohibition 'based on smoking and health' as that phrase is properly construed," *Id.* at —, 112 S.Ct. at 2624, but, rather, it is based on a more general duty—the duty not to conspire to commit fraud. Similarly, Ordinance 307 is not "based on smoking and health" but rather on a more general obligation—the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions. This more general obligation underlying Ordinance 307 is also reflected in Baltimore Ordinance 262 which limits billboard advertisements for alcoholic beverages.

The Court reasoned that this interpretation of the phrase "smoking and health" was appropriate for two reasons: (1) "Congress intended the phrase 'relating to smoking and health' to be construed narrowly, so as not to proscribe the regulation of deceptive advertising;" *Id.* at —, 112 S.Ct. at 2624, and (2) this interpretation of "based on smoking and health"

> is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state law obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity.

Id. at —, 112 S.Ct. at 2624. Thus, the Court concluded that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at —, 112 S.Ct. at 2624. Accordingly, the Court held that Cipollone's claim was not pre-empted. The Court went on to note that this reasoning was equally applicable to Cipollone's conspiracy claims and held that these claims were also not pre-empted.

Likewise, this interpretation of the phrase "smoking and health" is appropriate in the instant case for the same reasons. A narrow construction of the phrase "smoking and health" is appropriate because Congress did not intend to interfere with a State's regulation of tobacco sales to minors. The Report of the United States Senate which accompanied the enactment of the FCLAA makes that point clear: "[Section 1334] would in no way affect the power of any State . . . with respect to . . . the sale of cigarettes to minors." S.Rep. No. 91-566, 91st Cong., 1st Sess. 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. Moreover, such an interpretation is consistent with the purposes of the 1969 Act. Ordinance 307 does not create "diverse, nonuniform, and confusing" standards and relies on only a single, uniform standard: illegality.

The instant case differs from the claims that the *Cipollone* Court did find pre-empted. The Court held that Cipollone's failure to warn and neutralization of federally mandated warnings claims were pre-empted to the extent that they required "a showing that [the tobacco manufacturer's] post-1969 advertising . . . should have included additional, or more clearly stated, warnings." *Cipollone*, — U.S. at —, 112 S.Ct. at 2621. Ordinance 307 does not require any additions or alterations in the federally-mandated warning labels. Therefore, Ordinance 307 is distinguishable from Cipollone's pre-empted failure to warn and neutralization of federally mandated warnings claims.

The Court also found the first of Cipollone's fraudulent misrepresentation claims to be pre-empted. This claim was based on a state-law prohibition against statements in advertising and promotional materials that tended to minimize the health hazards associated with smoking. The Court held that the state prohibition was pre-empted because it was based on smoking and health and regarded advertising. Thus, Cipollone's claim based on this state prohibition could not stand. The Ordinance challenged in the present action, Ordinance 307, was promulgated to effectuate § 404. Unlike the state-law prohibition in *Cipollone*, the validity of § 404 is not challenged by Penn. Thus, Cipollone's claim is not analogous to the instant case.

Penn's second argument in support of its assertion that Ordinance 307 is "based on smoking and health" is that, regardless

of whether § 404 was "based on smoking and health," the true impetus behind the promulgation of Ordinance 307 was smoking and health concerns.

> Contrary to Defendant's contentions, concerns about smoking and health were, in fact, in the forefront of the City's concerns when it enacted Ordinance 307. Notwithstanding the City's efforts to obfuscate and camouflage those concerns, they none-the-less leaked out into the transcript of the City Council hearing on Ordinance 307. . . . Although apparently advised by their lawyers that if they abstained from saying the "H" word (health) they could successfully . . . not implicate the FCLAA pre-emption doctrine, the Chairman of the Hearing and the chief administrator of the city agency directly charged with protecting public health nevertheless let slip what everyone in the hearing room knew; that this cigarette advertising ban was based on concerns about smoking and health.

Plaintiff's Opp. to Def. Motion for Summ. Judg. at 11-12.

The "slips" Penn refers to occurred during the combined public hearings held on November 17, 1993 for Ordinances 307 and 262 before the City Council. The first "slip" Penn refers to was Chairman Anthony Ambridge's two statements that "These [Ordinances 307 and 262] will call into question several legal, health and aesthetic issues," Def.App. Ex. 6 p. 9, and "Federal and State governments have already determined that placing age restrictions on consumption of alcohol and tobacco products is in the public's health interest." Def.App. Ex. 6 p. 12. The second reference is to a letter from Dr. Peter Beilenson, the Commissioner of Health, that was received into the record by the City Council. In this letter, Dr. Beilenson wrote, "Not only is smoking a health hazard to the smoker . . . As we know, smoking is a health hazard to all in the immediate vicinity." Def.App. Ex. 6 p. 239.

Penn's suggestion that these comments change the purpose of Ordinance 307 is misguided. The City Council hearing process is an open one. Dozens of scientific experts, industry representatives, merchants, legal advisers and interested community members spoke their mind. The mention of "the 'H' word" at such a hearing could not change the purpose of the legislation in question from

that clearly stated in the law the legislature finally chose to adopt. As the Supreme Court observed in *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992),

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. Id. at 1149 (internal quotations and citations omitted). The City clearly stated what its purpose was in promulgating Ordinance 307: to effectuate § 404. Therefore, this Court need look no further than the language of Ordinance 307. In *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, — U.S. —, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993), the Supreme Court stated "we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate." *Id.* at —, 113 S.Ct. at 700. Likewise, in light of the clarity of the language the legislature chose to use in addressing the purpose of Ordinance 307 in its Preamble, this Court gives no weight to the statements of Chairman Ambridge and Dr. Beilenson.

The statements of Chairman Ambridge are irrelevant for yet another reason. The statements of Chairman Ambridge merely reflect his view as to the purpose of § 404, the prohibition against the sale of cigarettes to minors. But the purpose of § 404 is irrelevant to the present inquiry for the reasons discussed earlier. Therefore, Chairman Ambridge's remarks are irrelevant as well. And it certainly is no surprise that Dr. Beilenson, the Commissioner of Health, noted the potential health impact of a bill under consideration at a public forum for the discussion of the passage of that bill. In fact, it is expected that he address possible health impacts of ordinances under consideration. Thus, Dr. Beilenson's letter also does not change the purpose of the legislature in passing the statute.

Penn also attempts to impute a health motive to Ordinance 307 by directing this Court to the tenth paragraph of the seventh whereas clause of the Preamble to Ordinance 307: "Cigarettes are

a 'gateway' drug among Maryland students, *i.e.*, a substance often used by adolescents as a first drug which appears to 'open the door' for use of harder drugs at a later date." Penn asserts that the City's stated concern regarding cigarettes as a "gateway" drug can be nothing but a health concern and that, therefore, Ordinance 307 is "based on smoking and health." This argument is also not persuasive. Penn interprets this subsection of the Preamble as if it stands alone, separate from the remainder of Ordinance 307. This is an improper method of statutory construction. "[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole." Sutherland Stat Const § 46.05 (5th Ed). As established earlier, Ordinance 307 clearly states that its focus is illegality. In light of this, it is apparent that this subsection also refers to illegality: the illegal use of "harder drugs."

Penn relies heavily on *Vango Media, Inc.* v. *City of New York*, 829 F.Supp. 572 (S.D.N.Y.1993). This case concerned Vango's challenge of a New York City ordinance which required the display of one public health message pertaining to the health dangers of smoking for every four tobacco advertisements on certain property and facilities owned, operated or licensed by the City of New York, including taxicabs. But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus bringing the statute into conflict with the second stated purpose of the FCLAA. As the district court noted in holding that the statute was pre-empted by the FCLAA, "Congress had in mind avoiding precisely the type of anti-smoking message requirement now before this Court. The Local Law creates a regulation directly related to advertising that is 'diverse, nonuniform, and confusing' vis a vis the federal legislation." *Id.* at 583 (quoting 15 U.S.C. § 1331 (1970)). Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

This Court finds that Ordinance 307 is not "based on smoking and health." Rather, Ordinance 307 is clearly focused on illegality. Therefore, this Court holds that Ordinance 307 is not a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or

promotion of . . . cigarettes," and is not pre-empted by the FCLAA. Accordingly, this Court will grant the City's motion for summary judgment.

C. Ordinance 307 is not pre-empted by Maryland State Law

Penn next claims that Ordinance 307 is pre-empted by state law. Analogous to Federal law, "state law may pre-empt local law in one of three ways: (1) pre-emption by conflict, (2) express pre-emption, or (3) implied pre-emption." *Allied Vending* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). Penn argues that Ordinance 307 is invalid in that State law precludes it by the doctrine of implied pre-emption. The Court in *Allied Vending* elaborated upon this form of pre-emption, noting that:

> In *Sitnick*, we explained the theory of implied pre-emption: '[W]e wish it understood that there may be times when the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled.'

Id. at 298, 631 A.2d 77 (quoting *Mayor of Baltimore* v. *Sitnick*, 254 Md. 303, 323, 255 A.2d 376, 385 (1969)). Penn asserts that the State of Maryland has so forcibly expressed its intent to occupy the field of cigarette sales regulation as to pre-empt any local legislation in this area. Penn next argues that because the purpose of Ordinance 307 is to effectuate § 404, a prohibition of the sale of cigarettes to minors, Ordinance 307 is pre-empted by State law. Even if this Court accepts the proposition that Ordinance 307 would be pre-empted if Maryland State law completely occupied the field of cigarette sales regulation, a precarious position at best,[6] this

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[6] This position is questionable because Ordinance 307 regulates advertising, not sales. Though its purpose is to forward § 404, a law regulating sales, it is unclear to this Court whether this purpose would place a zoning ordinance regulating the placement of billboards, an area traditionally within the City's power, within the scope of the field Penn asserts is pre-empted, the field of cigarette sales regulation. This Court need not reach a conclusion regarding this issue because it is unnecessary to its holding. Therefore, this Court will not travel farther down this road.

argument could not succeed because the State has not completely occupied that field. Penn relies principally on *Allied Vending* in attempting to establish this proposition.

Penn asserts that the Maryland Court of Appeals in *Allied Vending* held that the State of Maryland has completely occupied the field of cigarette sales regulation, thus pre-empting any local legislation in this area by implication. Penn has misread *Allied Vending*. The Court in *Allied Vending* emphatically held that "in light of the comprehensive state-licensing scheme for cigarette vending machines provided by Article 56, §§ 607 through 631," *Allied Vending*, 332 Md. at 300, 631 A.2d 77, the State has expressed its intent to completely occupy the field of the sale of cigarettes through vending machines. In conclusion, the Court stated:

> In short, through the enactment of Article 56, §§ 607 through 631, the General Assembly has manifested an intent for the State to completely occupy the field of the sale of cigarettes through vending machines rendering any local or municipal ordinances in this area constitutionally invalid.

Id. at 310, 631 A.2d 77. Thus, the pre-emptive scope of Maryland State law, as established in *Allied Vending*, is substantially less broad than Penn asserts.

Ordinance 307 does not fall within the pre-emptive scope of §§ 607-631. The purpose of Ordinance 307 is to effectuate § 404, the State law prohibition of the sale of cigarettes to minors. Though the reach of the field pre-empted—regulation of the sale of cigarettes through vending machines—overlaps the reach of § 404—the sale of cigarettes to minors—the two are distinct and separate fields. Penn does not claim that § 404 demonstrates the intent of the State to completely occupy the field of the regulation of cigarette sales to minors, nor, in this Court's view, would it have been successful had it chosen to do so. Therefore, this Court holds that Ordinance 307 has not been pre-empted by State law. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

III. CONCLUSION

For the foregoing reasons, the City's motion for summary judgment will be granted as to all claims. The Court will enter a separate Order consistent with this Memorandum.

Senior United States District Judge

Dated: August 11, 1994

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANHEUSER-BUSCH, INCORPORATED,

Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Defendants-Appellees,

and

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

Nos. 94-1431, 94-1432.

Argued March 6, 1995.
Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, Circuit Judge:

We decide in this case whether Ordinance 288 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises alcoholic beverages" in certain areas of the City, violates the First

and Fourteenth Amendment protections of commercial speech. The district court concluded, after applying the four-part test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), that the ordinance did not violate the Constitution,[1] and we now affirm.

I

Under Maryland law, it is illegal to sell any alcoholic beverage to, or to obtain any alcoholic beverage for, a person under 21 years of age. It is also illegal for a person under 21 years of age to obtain, possess, or control an alcoholic beverage. Md.Code, Art. 27, §§ 400-403A. To advance the state's interest in those prohibitions and to promote "the welfare and temperance of minors exposed to advertisements for alcoholic beverages," the Maryland legislature authorized the Mayor and City Council of Baltimore (collectively "Baltimore") to adopt an ordinance restricting the placement of signs that advertise alcoholic beverages in "publicly visible locations," *i.e.* on "outdoor billboards, sides of buildings, and freestanding signboards." Md.Code, Art. 2B, § 222. The authorization, however, contains 10 limitations which prohibit Baltimore from restricting such advertising on, for example, buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums.

In January 1994, Baltimore exercised the authority granted it by the State and enacted Ordinance 288 prohibiting the outdoor advertising of alcoholic beverages in certain locations in Baltimore City.[2] The prohibition in the ordinance is subject to the same 10

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[1] The district court also concluded that the protection afforded by Article 40 of the Maryland Declaration of Rights is no broader than that afforded by the First Amendment and that therefore the ordinance also did not violate the Maryland Constitution. That ruling is not appealed.

[2] The core provision of the ordinance provides:

exceptions specified in the State's authorizing statute, and it also includes an exception permitting such advertising in certain commercially and industrially zoned areas of the City. By its terms, the ordinance was to become effective February 5, 1994.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages.[3] While one of the studies, the report of the Governor's Prevention Committee, acknowledged that certain studies advanced by the alcohol beverage and advertising industries showed no correlation between alcohol advertising and underage drinking, it concluded that the overwhelming majority of research studies showed a definite correlation. To combat underage drinking, the Prevention Committee's report recommended, among other things, that communities regulate alcoholic beverage advertising on billboards.

> Alcoholic beverage advertisements. No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings, and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(H).

[3] The preamble to the ordinance refers to at least four studies considered by the City Council: (1) a report by the Prevention Committee of the Governor's Drug and Alcohol Abuse Commission, entitled "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking"; (2) the "1992 Maryland Adolescent Drug Survey" conducted by the Maryland State Department of Education; (3) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Dangerous and Deadly Consequences"; and (4) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Drinking and Crime."

In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the "'overwhelming majority' of research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

On January 14, 1994, several weeks before the ordinance was to become effective, Anheuser-Busch, Inc., filed suit in federal court, facially challenging the constitutionality of the ordinance under the First and Fourteenth Amendments. It also challenged the ordinance as it might be applied to public service messages which Anheuser-Busch typically sponsors. One week later, Penn Advertising of Baltimore, Inc., filed a similar suit.

Anheuser-Busch is the nation's largest brewer of beers and malt beverages, producing approximately 15 different brands,

including Budweiser, Michelob, and Busch. It advertises in all media, including outdoor billboards and displays. In addition to contending that there is no correlation between alcoholic beverage advertising and underage drinking, Anheuser-Busch asserts that the purpose of its advertising is "to solidify brand loyalty and increase market share by shifting adult beer drinkers from other brands to the advertised brand of beer." In its complaint, Anheuser-Busch alleges that it promotes its brands of beer on dozens of billboards in Baltimore and that on seven it publishes public service messages such as, "Know when to say when" and "Let's stop underage drinking before it starts." These public service messages typically include a corporate or product logo of Anheuser-Busch.

Penn Advertising is engaged in the business of placing advertising on outdoor advertising signs located throughout Baltimore. It leases land from private property owners, erects and maintains outdoor sign structures on those locations, and rents these signs to its customers, including Anheuser-Busch.

Shortly after commencing these actions, Anheuser-Busch and Penn Advertising filed a motion for a preliminary injunction to enjoin enforcement of Ordinance 288 pending the litigation, and the district court issued a stay of the ordinance's enforcement. The Mayor and City Council of Baltimore filed motions to dismiss the actions under Federal Rule of Civil Procedure 12(b)(6) on the grounds that the ordinance is (1) protected by the Twenty-First Amendment and (2) a proper regulation of commercial speech under the framework established in *Central Hudson*. Baltimore attached to its motions the legislative history of Ordinance 288, including the transcript of the hearings before the City Council and copies of four studies that were considered by the Council.

Following a hearing, the district court issued an opinion upholding the constitutionality of the ordinance. *Anheuser-Busch, Inc.* v. *Mayor and City Council*, 855 F.Supp. 811 (D.Md.1994). The court also continued its stay of the ordinance's enforcement pending appeal. Contrary to the parties' entreaties that the district court treat Baltimore's motion only as a 12(b)(6) motion, the court concluded in its opinion that because it considered matters outside of the pleadings, it would treat Baltimore's motion to dismiss as a

motion for summary judgment under Rule 56. On the merits, the court found that "a reasonable fit exists between the Ordinance and the City's asserted interests," *id.* at 820, and that billboards "loom[ ] over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement." *Id.* at 822. The court held the ordinance constitutional after concluding that it "directly advances the City's asserted interest in promoting the welfare and temperance of minors" and is "narrowly tailored" to that end. *Id.* at 818. Having found the ordinance constitutional under the framework set outk in *Central Hudson*, the court did not address Baltimore's argument that the ordinance was protected by the Twenty-First Amendment.

On appeal, Anheuser-Busch and Penn Advertising contend that the district court erred by converting Baltimore's motions to dismiss into motions for summary judgment without allowing them a reasonable opportunity to submit all materials pertinent to consideration of a motion for summary judgment. On the merits, they argue that the ordinance is unconstitutional on its face because (1) it does not directly and materially advance the government's interest in promoting temperance of minors and (2) it is not narrowly tailored to serve that purpose.[4] They also argue that, as applied, the ordinance would impermissibly restrict their noncommercial speech.

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[4] Amici curiae briefs, addressing principally the facial challenge under the First Amendment, were received from the Association of National Advertisers, Inc., the American Association of Advertising Agencies, The Media Institute, the National Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, and the Center for Science in the Public Interest.

II

We address first the contention that the district court erred in converting Baltimore's motions to dismiss into motions for summary judgment without first providing the parties an opportunity to conduct discovery and to submit all pertinent materials to the court. Anheuser-Busch and Penn Advertising contend that they had no indication that the district court had converted the motions to dismiss into motions for summary judgment until the court issued its memorandum opinion.

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

(Emphasis added). We have held that a court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56. *See Gay* v. *Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Plante* v. *Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson* v. *RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974).

In ruling on Baltimore's 12(b)(6) motions, the district court stated, without prior notice to the parties, "Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56." 855 F.Supp. at 812. Apparently the court's facial analysis of the ordinance relied to some extent on the exhibits which Baltimore filed with its motion to dismiss, and the court's as-applied analysis involved consideration of the submissions Anheuser-Busch offered in support of its motion for a preliminary injunction. The exhibits

which Baltimore filed in support of its motion to dismiss consisted of a copy of Ordinance 288, a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance. In support of their motions for a preliminary injunction, Anheuser-Busch and Penn Advertising submitted, among other things, the Brewing Industry Advertising Code, sample billboard advertisements, and studies which refute a correlation between alcoholic beverage advertising and underage drinking.

The principal challenge to Ordinance 288, advanced under the last two prongs of *Central Hudson*, consists of the contention that the ordinance (1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore's statutory objective and the means it selected to achieve that objective. On this facial challenge, the City bears the burden not of establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had an objectively reasonable belief that the means which it selected constituted a reasonable "fit" with the regulation's purpose.

If *Central Hudson's* test required a perfect fit, then Anheuser-Busch would only have to demonstrate some application of the statute inconsistent with the statute's purpose to render it unconstitutional for all purposes. Moreover, if the test required a perfect fit, Anheuser-Busch would certainly be entitled to complete discovery in order to identify all of the statute's possible applications. However, in response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. *See, e.g.*,

Florida Bar v. *Went For It, Inc.*, — U.S. —, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). As the Supreme Court recently observed in *Florida Bar*:

> [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at — - —, 115 S.Ct. at 2377-79 (citations omitted). Cf. *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (pointing to facts relevant to consideration of *as-applied* challenge to commercial speech regulation). In *Florida Bar*, the Court relied principally on a study conducted by the Florida bar on the effects of lawyer advertising to conclude that the prohibition against lawyer solicitation within 30 days of an accident directly and materially advanced the state's substantial interest of preserving the integrity of the legal profession. Thus, the government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are "legislative facts," the substance of which cannot be trumped by the fact finding apparatus of a single court. *See Dunagin* v. *City of Oxford*, Miss., 718 F.2d 738, 748-49 n. 8 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). While a party challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other. The court's role in reviewing the constitutionality of a legislative enactment is more fundamental; it is limited to addressing whether the legislative enactment conflicts with the Constitution. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

By force of the same reasoning, if a plaintiff challenges a legislative enactment *as applied* to an actual circumstance, then the

court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the legislative enactment. *See Edenfield*, — U.S. at —— - ——, 113 S.Ct. at 1800-01.

In this case, the district court properly looked to the legislative history of Ordinance 288 to determine that Baltimore had met its burden under *Central Hudson*. Having found the burden met, the court was not required on a facial challenge to look further with a more specific inquiry into the ordinance's impact on Anheuser-Busch and Penn Advertising, nor did it. It was unnecessary for the court to have concluded that, because it looked beyond the pleadings to the transcript and four studies constituting the legislative history, it had to consider the case under Rule 56. For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law. *See generally* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint).

Thus, on the facial challenge to Ordinance 288, we will review the district court's decision, insofar as it considered only the ordinance and its legislative history, as a ruling under Federal Rule of Civil Procedure 12(b)(6), and we review that ruling *de novo*.

III

Traditionally, commercial speech was thought to be an aspect of a free market economy, providing information necessary to enable informed market decisions to be made. While commercial speech was subject to governmental regulation, such regulation was resisted by the same forces that favor open and competitive markets. Such speech was not, however, thought to be protected by the First Amendment. *See, e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). Beginning in 1975 with the Supreme Court's decision in *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), and in 1976

with its decision in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), a "measure" of First Amendment protection was afforded commercial speech in respect of its informational function. But that protection is significantly weaker than that accorded to the regulation of which is examined under the rubric of strict scrutiny. *See Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505-07, 101 S.Ct. 2882, 2891-92, 69 L.Ed.2d 800 (1981) (plurality opinion). The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny, *see generally Florida Bar*, — U.S. at ——-——, 115 S.Ct. at 2375, which is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

Intermediate scrutiny of commercial speech regulation is conducted under the four-pronged scheme set forth in *Central Hudson*. Because the basis for affording protection to commercial speech pertains to its informational function, in order to be entitled to any First Amendment protection, the speech must (1) concern lawful activity and not be misleading. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," *i.e.* "not more extensive than is necessary" to serve the governmental interest. *Id.* at 565-66, 100 S.Ct. at 2351. *See also Florida Bar*, — U.S. at ——, 115 S.Ct. at 2375-77.

The first two prongs of *Central Hudson* are not disputed in this case. First, the purchase and consumption of alcoholic beverages are generally lawful, and no party claims that Baltimore's ordinance targets misleading advertising. And second, it is conceded that Baltimore City has a substantial interest in promoting "the welfare and temperance of [its] minors," the interest which it seeks to advance through Ordinance 288. The dispute in this case centers on the third and fourth prongs of *Central Hudson*—whether

Ordinance 288 "directly advances" Baltimore City's interest in reducing underage drinking and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry required under these two prongs amounts to consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986); *United States* v. *Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993).

The inquiry under *Central Hudson's* third prong—whether the regulation directly advances the stated interest—does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation. In *Edge*, where the federal regulation under consideration prohibited the broadcasting of lottery advertisements from facilities in North Carolina (in support of that state's anti-gambling policy), the Edge Broadcasting Company contended that the regulation did not advance the governmental interest at stake by sufficiently direct means. The company demonstrated that even though its broadcasting facility was located on the North Carolina side of the Virginia/North Carolina border, over 90% of its listeners were located in Virginia, where gambling was not illegal. It also noted that the federal regulation did not prohibit a Virginia-based broadcasting company from directing its signal to North Carolina listeners and advertising the Virginia lottery. The company argued, therefore, that the regulation did not directly advance the stated governmental interest of supporting North Carolina's anti-gambling policy. Rejecting the company's argument, the Supreme Court applied a standard that validated the legislature's commonsense judgment that its interests would be advanced by the regulation:

> Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from

> lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.

--- U.S. at ---, 113 S.Ct. at 2704. As the result of applying this standard the Court concluded, "We have no doubt that the statutes directly advanced the governmental interest at stake in this case. . . . [T]his would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* --- U.S. at ---, 113 S.Ct. at 2704.

Similarly, in *Posadas* the Court observed that it was reasonable for the Puerto Rico legislature to conclude that its interest in reducing its residents' demand for casino gambling would be advanced by placing limitations on casino advertising. *See* 478 U.S. at 341-42, 106 S.Ct. at 2977.

Again in *Metromedia*, the Court summarized this approach to the third prong of *Central Hudson* by noting that the reviewing court may be satisfied where the legislative judgment is "not unreasonable." 453 U.S. at 509, 101 S.Ct. at 2893. The Court applied that principle in upholding a ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, even in the face of a claim that the record was "inadequate to show any connection between billboards and traffic safety." *Id.* at 508, 101 S.Ct. at 2893.

In each case where the Supreme Court affirmed the legislative judgment as reasonable, a logical correlation existed between the legislative objective and the means selected to achieve that objective. Thus in *Edge*, even though only 7.8% of Edge Broadcasting's listening public lived in North Carolina and even though that small population would still be subject to Virginia-based lottery advertisements, the Court concluded that North Carolina's anti-gambling policy would be advanced by prohibiting all lottery advertising by North Carolina-based facilities. *See* --- U.S. at ---, 113 S.Ct. at 2704. In *Posadas*, Puerto Rico's regulation prohibiting casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico" was likewise found to advance Puerto Rico's interest in reducing its residents' demand for casino gambling. *Id.* at 341, 106 S.Ct. at 2976-77. Adding to the

obviousness of that logic, the Supreme Court noted that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view." *Id.* at 342, 106 S.Ct. at 2977 (citing the statement from *Central Hudson*, "There is an immediate connection between advertising and demand for electricity [the advertised product]. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569, 100 S.Ct. at 2353).

In line with these precedents, we find that it was reasonable for the Baltimore City Council to have concluded that Ordinance 288's regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. The City Council found that outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in their neighborhood, are exposed daily to this advertising. The City Council pointed to its legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies have reached the same conclusion. There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson's* third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

Each circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing demand. In Dunagin, the Fifth Circuit stated:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated, common-sense judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

718 F.2d at 750. Similarly, in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Tenth Circuit upheld a prohibition against advertising alcoholic beverages, stating:

> [W]e hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales.

Id. at 501, 101 S.Ct. at 2889. We now join these courts in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking.[5]

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[5] The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*, may, however, be insufficient to support a general prohibition against price advertising of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir.1994), *cert. granted*, — U.S. —, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995). *Cf. Rubin* v. *Coors Brewing Co.*, — U.S. —, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars").

Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. 447 U.S. at 556, 100 S.Ct. at 2343. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. *See Florida Bar*, — U.S. at —, 115 S.Ct. at 2375-77; *Board of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 478, 109 S.Ct. 3028, 3033-34, 106 L.Ed.2d 388 (1989). In assessing whether a regulation is narrowly tailored to serve the state's interest under an intermediate scrutiny framework, the Supreme Court has held that the fit between the regulation and the state's interest need not be perfect, but need only be reasonable. *See Fox*, 492 U.S. at 480, 109 S.Ct. at 3034-35. Summarizing the fourth prong of *Central Hudson*, the Court in *Fox* stated:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

490 U.S. at 469, 109 S.Ct. at 1913 (citations and internal quotations omitted). Thus, if a regulation goes only "marginally beyond what would adequately have served the governmental interest," the regulation will not be invalidated; only when a regulation is "substantially excessive, disregarding far less restrictive and more precise means" will the regulation be invalidated under this prong of *Central Hudson*. *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034 (citations and internal quotations omitted). And when there is no "far less restrictive and more precise means" available, the Court has accepted a broad ban of commercial advertising on the grounds that it was "perhaps the only effective approach." *Metromedia*, 453 U.S. at 508, 101 S.Ct. at 2893.

Satisfaction of the fourth prong of the *Central Hudson* test presents the closest question in this case. It is readily acknowledged that limitations on outdoor advertising of alcoholic beverages designed to protect minors also reduce the opportunities for adults to receive advertised information. And adults, who constitute a majority of the population, are not the object of the government's legislation. But it also appears that no less restrictive means may be available to advance the government's interest.

Anheuser-Busch argues that Baltimore could just as effectively advance its goal of promoting the welfare and temperance of minors by increasing enforcement of existing laws prohibiting sales to, and possession of alcoholic beverages by, minors, or by implementing and encouraging educational programs on the dangers of alcohol. These approaches might indeed prove beneficial in reducing underage drinking, but they do not provide an alternative to the approach selected by the City of curbing the enticement to consume alcoholic beverages. As the Supreme Court observed, quoting the Fifth Circuit in *Dunagin*:

> "We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol . . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers."

Posadas, 478 U.S. at 344, 106 S.Ct. at 2978 (quoting *Dunagin* v. *City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984)).

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to

address, the City must be given some reasonable latitude. *See Posadas*, 478 U.S. at 346-47, 106 S.Ct. at 2979-80; *Metromedia*, 453 U.S. at 509, 101 S.Ct. at 2893; *Ohralik*, 436 U.S. at 455-56, 98 S.Ct. at 1918. Similar problems did not defeat the legislature's efforts in Posadas (where a ban that went substantially beyond the targeted population was upheld); in Edge (where a ban that was intended to apply to only 7.8% of the regulated company's listening public was upheld); or in Metromedia (where a ban on all billboards containing commercial advertising was upheld, even though some signs might not create a traffic hazard).

The problem of underage drinking is a most serious one that contributes significantly to a variety of social problems. Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related, and 40 to 50% of juveniles who drowned or had diving accidents had consumed alcohol immediately prior to the incident. The City Council found that alcohol is overwhelmingly and consistently the most widely used "drug" at all adolescent age levels. It pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30 days. Widespread underage drinking was also found to be a major factor in crime. One-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours, and nearly 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

While it was readily recognized that regulating outdoor advertising would not wholly cure these problems, the regulation was one of the means recommended by the Governor's Prevention Commission, and it was responsive to numerous studies which link alcohol advertising and underage drinking. Through outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message. *See Packer Corp.* v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274, 76 L.Ed. 643 (1932) (billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). The City argues that the only means to address this problem is to ban such advertising in locations where children generally walk and play. Such a ban still permits adults

to receive advertising messages and information from signs in commercial areas of the City and through the numerous other media to which adults are constantly exposed.[6]

Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration. Accordingly, we find that Baltimore's Ordinance 288 limiting the location of outdoor billboards advertising alcoholic beverages in the City of Baltimore meets *Central Hudson's* fourth prong.

In summary, Baltimore City's regulation of stationary outdoor "advertising that advertises alcoholic beverages" in certain locations directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are involuntarily and unavoidably exposed to such advertisements. While the means selected of limiting the location of such outdoor advertising is not a perfect "fit" with the governmental objective, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

IV

In addition to their facial challenge of Ordinance 288, Anheuser-Busch and Penn Advertising contend that "as applied" the ordinance will impermissibly restrict *noncommercial* speech. They

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[6] It is noteworthy that for similar reasons the FCC has prohibited cigarette advertising on television and other electronic media. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 *et seq.* (upheld in *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.D.C.1971), *summarily aff'd. sub nom. National Assoc. of Broadcasters* v. *Kleindienst*, 405 U.S. 1000, 92 S.Ct. 1290, 31 L.Ed.2d 472 (1972)). Yet parents have more control over children's exposure to television than they have over children's exposure to outdoor advertising.

argue that the prohibition of outdoor "advertising that advertises alcoholic beverages" would prohibit their noncommercial public service messages which, they maintain, address issues of public interest. On "at least seven" of its billboards in Baltimore City, Anheuser-Busch has devoted a portion of its advertising display space to public service messages, such as "Let's stop underage drinking before it starts," and "Take a friend home for the holidays—friends know when to say when." These messages also include the corporate logo for Anheuser-Busch or a reference to "Budweiser."

There are no allegations that Baltimore considers these signs to fall under the ordinance as "advertising that advertises alcoholic beverages." Indeed, Anheuser-Busch's complaint was filed before the ordinance was to take effect, and as a result, the enforcement of the ordinance has been stayed. Furthermore, the City has indicated that it does not intend to enforce the ordinance against noncommercial speech.

In addressing this argument, the district court observed that whether the public service messages actually constitute noncommercial speech is arguable. The court assumed, without deciding, that the ordinance would not apply to legitimate public service messages, but was unwilling to "render an advisory opinion solely to distinguish between legitimate [public service messages] and true advertisements." 855 F.Supp. at 821. The question of whether speech both advertising a product and providing a public service message constitutes commercial speech is not well settled and may rest strictly on factual findings.

It is settled that commercial speech is speech which does "no more than propose a commercial transaction." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983) (citations and internal quotations omitted). But in *Bolger* the Court held that multi-page flyers published by a contraceptive manufacturing company to publicize the availability and desirability of contraceptives constituted commercial speech "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68, 103 S.Ct. at 2881 (footnote omitted). The

Court explained, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68, 103 S.Ct. at 2881 (quoting *Central Hudson*, 447 U.S. at 563 n.5, 100 S.Ct. at 2350 n.5).

In this case, Ordinance 288 is directed only at commercial billboards advertising the sale of alcoholic beverages and does not facially regulate public service messages. The question of whether a particular billboard falls within the ordinance's proscription is, on the record before us, a hypothetical one. The City has not threatened to enforce its ordinance against such public service messages and has indicated that it does not intend to do so. Accordingly, we conclude that such an as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular advertisement.

For the reasons stated, we affirm the judgment of the district court, upholding Baltimore City Ordinance 288 against a facial constitutional challenge under the First and Fourteenth Amendments.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE,

Amici Curiae.

No. 94-2141

On Petition for Rehearing with Suggestion for Rehearing In Banc

Filed October 16, 1995.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX E

Baltimore Ordinance No. 307 (City Council Bill 627):

AN ORDINANCE concerning

ZONING CODE—ADVERTISING CIGARETTES

FOR the purpose of restricting the placement of outdoor advertisements for cigarettes; and providing a penalty.

BY adding
Article 30 - Zoning
Chapter 10 - Sign Regulations
Section 10.0-1i
Baltimore City Code (1983 Replacement Volume, as amended)

By repealing and reordaining with amendments
Article 30 - Zoning
Chapter 11 - Administration and Enforcement
Section 11.07
Baltimore City Code (1983 Replacement Volume, as amended)

Preamble

WHEREAS, Section 404 of Article 27 of the Maryland Code makes it unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years; and

WHEREAS, More than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, Cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes; and

WHEREAS, Outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in Packer Corporation v. Utah, 285 U.S. 105 (1932) by citing with approval the following excerpt from the opinion of the Utah Supreme Court:

> "Advertisements of this sort are constantly before the eyes of observes on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

WHEREAS, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."); gambling, see Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341-42 (1986) ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one

. . . "; cigarettes, see Capital Broadcasting Co. v. Mitchell, 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people."), aff'd per curiam, 405 U.S. 1000 (1972); and alcohol, see Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (1983) (extensively reviewing evidence on connection between liquor advertising and consumption and rejecting inter-brand competition argument), cert. den., 104 S. Ct. 3533 (1984); and

WHEREAS, In addition to judicial recognition of the general link between advertising and consumption, there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including:

> Davis R. "Current trends in cigarette advertising and marketing". New England Journal of Medicine. 1987;316:725-732
>
> Chapman S., Fitzgerald B. "Brand preference and advertising recall in adolescent smokers: some implications for health promotion". American Journal of Public Health. 1982;72:491-494
>
> Klintzner M., Gruenewald PJ, Bamberger E. "Cigarette advertising and adolescent experimentation with smoking." British Journal of Addiction. 1991;86:287-298
>
> Goldstein AO, Fischer PM, Richards JW, Cretin BA. "Relationship between high school student smoking and recognition of cigarette advertisements." Journal of Pediatrics. 1987;110:488-491
>
> Hunter SM, Webber LS, Berenson GS. "Cigarette smoking and tobacco usage behavior

in children and adolescents: Bogalusa Heart Study." Preventive Medicine. 1980;9:701-712

Hunter Sm, Croft JB, Burke GL, Parker FC, Webber LS, Berenson GS. "Longitudinal patterns of cigarette smoking and smokeless tobacco use in youth: the Bogalusa Heart Study." American Journal of Public Health. 1986;76:193-195

Aitken PP, Leathar DS, O'Hagan FJ, Squair SI. "Children's awareness of cigarette advertising and brand imagery." British Journal of Addiction. 1987;82:615-622

Charlton A. "Children's advertisement awareness related to their views of smoking". Health Education Journal. 1986;45(2)75-78

Aitken PP, Leathar DS, Squair SI. "Children's awareness of cigarette brand sponsorship of sports and games in the UK". Health Education Research. 1987;1:203-211

Alexander HM, Calcott R., Dobson AJ, et al. "Cigarette smoking and drug use in school children, IV: factors associated with changes in smoking behavior". International Journal of Epidemiology. 1983;12:59-66

WHEREAS, The 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education found that:

Cigarettes are the second most commonly used substance by Maryland adolescents, with 41.9% of twelfth graders and 11.2% of sixth graders having used cigarettes in the twelve months preceding the study.

Cigarettes constitute a "gateway drug" among Maryland students, i.e., a substance which is used by adolescents as

a first drug and opens the door for use of other "harder" substances at a later date.

75% of twelfth graders first tried cigarettes before the age of 15.

By age 10 or under, 12.4% of males and 9.3% of females smoke.

Roughly 14% of twelfth graders smoke on a daily basis.

The percentage of Maryland students using cigarettes in the twelve months preceding the survey exceeds the national percentage by 13.6% for twelfth graders, 15% for tenth graders, and 12.1% for eighth graders.

Cigarette users were more likely than users of other substances described in the Survey to report having tried unsuccessfully to stop.

Cigarette use by sixth graders appears to be increasing with the percentage of sixth graders reporting having used cigarettes in the past thirty days increasing from 3.6% in 1988 to 4.7% in 1992.

4.7% of sixth graders, 14.4% of eighth graders, 22.7% of tenth graders, and 31.5% of twelfth graders reported use of cigarettes within the past 30 days.

Cigarettes are a "gateway" drug among Maryland students, i.e., a substance often used by adolescents as a first drug which appears to "open the door" for use of harder drugs at a later date; and

WHEREAS, An ordinance restricting the placement of advertisements for cigarettes in publicly visible locations within Baltimore City is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors; and

WHEREAS, The restrictions contained in the following Ordinance will not unduly burden legitimate business activities of persons licensed by the State of Maryland to sell cigarettes on a retail basis; and

WHEREAS, In order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities, the Baltimore City Council has determined not to restrict advertisements of cigarettes in certain designated business and industrial zones hereinafter identified, with reasonable and appropriate setbacks from adjoining zones; now, therefore,

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983) Replacement Volume, as Amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations.

10.0-1. General Requirements.

I. CIGARETTE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR OTHER FORM OF ADVERTISING THAT ADVERTISES CIGARETTES IN A PUBLICLY VISIBLE LOCATION. IN THIS SECTION "PUBLICLY VISIBLE LOCATION" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE ANY PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS "LICENSE" AS DEFINED IN SECTION 16-201(B) OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE; OR (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING CIGARETTES;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING SUCH PREMISES;

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRE;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF CIGARETTES;

5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF CIGARETTES;

6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;

7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;

8. ANY SIGN AT MEMORIAL STADIUM;

9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;

10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR

11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM ANY SUCH OTHER ADJOINING ZONE.

Chapter 11—Administration and Enforcement

11.07. Penalties for Violation.

Any person who violates, disobeys omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING THE PROVISIONS OF SECTION 10.0-1I MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

SEC. 3. AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

Certified as duly passed this 28th day of February, 1994.

(Signed) Mary Pat Clarke

President, Baltimore City Council

Certified as duly delivered to His Honor, the Mayor, this 1st day of March, 1994.

(Signed) Leonard F. Wright

Chief Clerk

Approved this 7th day of March, 1994.

(Signed) Kurt L. Schmoke

Mayor, Baltimore City

APPENDIX F

Baltimore Ordinance No. 328 (City Council Bill 709):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated area(s) on which all signs for the premises shall be located. The consolidated area(s) shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

Chapter 13 — Rules and Definitions

13.0-2. Definitions.

74. Sign: any writing (including letter, word, or numeral), pictorial representation (including illustration or graphic), emblem (including symbol or trademark), flag (including banner or pennant), device, or any other figure of similar character which: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a building, window (this includes anything affixed to the interior and displayed in the space within twelve inches of the window), or other structure; and (b) is used to announce, direct attention, or advertise; and (c) is visible from outside a building. A sign shall not, however, include any writing, representation, or any figure of similar character within a building.

* * * *

APPENDIX G

Baltimore Ordinance No. 329 (City Council Bill 711):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated areas on which all signs for the premises shall be located. The consolidated areas shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

8. Any sign on the side of a "licensed premises", as defined in Article 2B of the Annotated Code of Maryland, indicating the brand name and price of an alcoholic beverage product or a cigarette product available for sale within the "licensed premises" when permitted by any provision of this code or any other law or regulation now or hereinafter in force.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In an effort to reduce illegal consumption of cigarettes by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible cigarette advertisements. The ordinance was enacted after the City Council found specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors. The ordinance is tailored to restrict only those advertisements which most directly affect minors in areas where they live, attend school, attend church, and engage in recreational activities. The district court and the court of appeals both upheld the ordinance. The questions presented are:

1. Whether in determining the constitutionality of the ordinance under the First Amendment, the reviewing court is licensed to reweigh *de novo* the evidence and predictive judgments of the legislature supporting the enactment, or to replace the legislature's factual predictions with its own.

2. Whether an ordinance restricting the *location* but not the *content* of publicly visible cigarette advertising, passed in order to reduce consumption of cigarettes by minors in violation of state law, is preempted by the Federal Cigarette Labeling and Advertising Act.

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered 31 August 1995 be denied for the reasons set forth below.

STATEMENT

Baltimore incorporates and adopts by reference the statement of the facts in the opinion of the Fourth Circuit. Pet. App. 2a-5a.

Rule 15 of the Rules of the Supreme Court of the United States provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Baltimore is thus constrained to address Petitioner's misstatements concerning the basis for the court of appeals' rejection of its preemption argument, and an asserted "concession" by Baltimore's counsel during oral argument in the court of appeals concerning the governmental purpose supporting the challenged ordinance.

Md. Ann. Code art. 27, § 404 (1972) prohibits the sale of cigarettes to minors.[1] Baltimore's ordinance, as stated in its preamble (Pet. App. 70a), as asserted by Baltimore

[1] The ordinance challenged in this case became effective April 6, 1994. Effective October 1, 1994, state law prohibited minors from using or possessing any tobacco product. Md. Ann. Code art. 27, §§ 404 & 405A (Supp. 1994). See Pet. App. 2a.

in court (*id.* at 16a), and as found by both the district court (*id.* at 16a; 37a) and the court of appeals (*id.* at 2a; 4a; 9a; 10a), was enacted to reduce the illegal consumption of cigarettes by minors. Thus, Petitioner misstates the case when it makes the following assertions:

> Significantly, the court of appeals did not accept the argument advanced in the City's brief that the ordinance was not based on health considerations because its drafters identified as its purpose the facilitation of compliance with a state law . . . that precludes the sale of cigarettes to minors. [Pet. 3, n. 2]
>
> * * *
>
> As we note above (at note 2), the court of appeals pointedly did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors. [Pet. 23, n. 15]
>
> * * *
>
> [T]he City has conceded that the ordinance is predicated on the relationship between smoking and health. [Pet. 23]

The district court was very specific in disposing of Petitioner's preemption argument, and the court of appeals adopted and followed the reasoning of the district court. In determining that the ordinance is not one "based on smoking and health" as that phrase is used in 15 U.S.C. § 1334(b), the preemption section of the Federal Cigarette Labeling and Advertising Act, the district court stated:

> Ordinance 307 is clearly aimed at the illegal sale of cigarettes to minors. Its purpose is to effectuate [Md. Ann. Code art. 27] § 404 and, therefore, Ordinance 307 is not " 'based on smoking and health . . . ' giving that clause a fair but narrow reading." [*Cipollone v. Liggett Group, Inc.*] 112 S. Ct. at 2621.
>
> * * *
>
> Similarly, Ordinance 307 is not "based on smoking and health" but rather on a more general obligation – the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions.

Pet. App. 37a; 38a. It is thus clear that the district court, whose reasoning was explicitly adopted by the court of appeals (as will be shown instantly) *did* accept Baltimore's contention that the ordinance is intended to facilitate compliance with the state law which precludes the sale of cigarettes to minors.

The court of appeals observed that the purpose of Baltimore's ordinance is "to reduce the illegal consumption of cigarettes by minors." Pet. App. 2a; 3a. The court of appeals opined that "the ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health* (Pet. App. 9a) (emphasis in original), and that "[a] regulation with such a general relationship to cigarette smoking – in contrast to a specific advertising 'prohibition based on smoking and health' – is not preempted by the Federal Cigarette Labeling and Advertising Act." *Id.* Lest there be any doubt as to the basis for the court of appeals' rejection of Petitioner's

preemption argument, and to put the lie to Petitioner's erroneous statement that "the court of appeals *pointedly* did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors," Pet. 23, n. 15 (emphasis added), it is only necessary to refer to the following statement from the decision of the court of appeals:

> For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20 [Pet. App. 33a-43a], we reject the contention that Ordinance 307 is preempted and therefore null and void.

Pet. App. 10a.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE FOURTH CIRCUIT NEITHER INVOLVES A QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT NOR CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The first question presented in the petition (which Petitioner has loaded with a mischaracterization of the court of appeals' decision) does not raise a question of federal law that has not been settled by this Court. The nature of the judicial inquiry into the constitutionality of restrictions on commercial speech has repeatedly and recently been addressed by this Court, to the extent that the question should be deemed settled. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995); *Rubin v. Coors Brewing*

Co., 115 S. Ct. 1585 (1995); *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *United States v. Edge Broadcasting System, Inc.*, 113 S. Ct. 2696 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). *See also Turner Broadcasting System Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion).[2] As a court of law, and not a court of error, this Court must be wary of petitions (such as the instant one) which invite it to review a court of appeals' determination as to the sufficiency of a legislative record based on an asserted inconsistency between the decision of the court of appeals and the holdings of this Court; and the Court's skepticism about granting review under such circumstances should be magnified where, as here, the petition does not assert that the issue presented is one which has split the courts of appeals or has not yet been settled by this Court.

In light of the many recent pronouncements of this Court concerning the scope of judicial review of restrictions on commercial speech two points bearing on this case's candidacy for certiorari must be acknowledged: (1) even if the decision of the court of appeals is erroneous (a contention which Baltimore vehemently rejects and which will be touched upon below) it is not likely that the lower federal and state courts will follow its statement of the scope of judicial review rather than the many recent

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[2] The First Amendment issue in this case is tangentially related to the issue presented in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, cert. granted, 116 S. Ct. 35 (1995), although the decision in that case is not likely to shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led the court of appeals to a different result.

statements of this Court, and (2) review of this case is decidedly not likely to result in the announcement of any new commercial speech jurisprudence by this Court (much less to settle an issue which has not previously been settled).

* * *

There is neither apparent nor actual conflict between the decision of the Fourth Circuit and decisions of this Court. In terms of its statement of the criteria a court must employ in determining the constitutionality of a commercial speech restriction, the Fourth Circuit correctly set out this Court's controlling test as first announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). Pet. App. 10a. The Fourth Circuit elaborated on that statement by reference to its contemporaneous decision in the related case of *Anheuser-Busch Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), cert. pending, No. 95-685 (reprinted at Pet. App. 46a-67a). Pet. App. 11a; 12a. *Anheuser* contains a detailed analysis and explication of the appropriate standard of review as revealed by the decisions of this Court. *See* Pet. App. 54a-55a, 58a-65a (63 F.3d at 1311-1317).

In this case, as in *Anheuser*, Baltimore met its burden under the *Central Hudson* third prong with *both* empirical support and sound reasoning. This Court has recently affirmed that restrictions of commercial speech may be justified based on "simple common sense," *Went For It*, 115 S. Ct. at 2378, and the common sense link between cigarette advertising on billboards and consumption of cigarettes by minor is self apparent. *Cf., Edge Broadcasting*

Co.; Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); *Anheuser; Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490 (10th Cir. 1983), rev'd on other grounds sub. nom. *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984). *See also Cal-Almond Inc. v. United States Department of Agriculture*, 14 F.3d 429, 439 (9th Cir. 1993) ("[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised"). The cases relied upon by Petitioner to demonstrate a conflict between the decision of the Fourth Circuit and decisions of this Court, such as *Edenfield, Ibanez* and *Coors*, are all distinguishable from the instant case because in none of them was there a logical or common sense link between the restraint imposed by the legislature and the governmental interest sought to be advanced. Without evidence compensating for the lack of a logical or common sense link, the efficacy of the restraints in the cases relied upon by Petitioner could be defended with only speculation.

This case does not provide a vehicle for reexamination of this Court's assumption, as a matter of law, that advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden: it relied on evidence. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. Using language which demonstrates that the court of appeals correctly understood Baltimore's burden and held Baltimore to it, the court stated:

> The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position.

Pet. App. 3a. The studies and articles referred to in the preamble to Baltimore's ordinance, which the City Council and both of the lower courts found sufficient to demonstrate *convincingly* that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes, were placed in the record by Baltimore, and are sufficient to satisfy its burden under the third prong of *Central Hudson*. Review of the determination of the lower courts as to the sufficiency of the evidence in the legislative record would not be a prudent use of this Court's certiorari jurisdiction, and would not be consistent with its role under the Constitution.

* * *

Petitioner's argument based on the fourth prong of *Central Hudson* is no more than a mere assertion that the Fourth Circuit erred, without pretense that discretionary review by this Court would be of interest or importance to anyone other than the parties. In any event, there was no error. Baltimore's enactment is well tailored to achieve no more than its substantial objective. The capacity of Baltimore to sponsor an educational campaign to teach children the danger of tobacco does not render the City's restriction of Petitioner's billboards too burdensome. This

Court considered and rejected an identical "counter-speech" argument in *Posadas*, and in so doing cited with approval the Fifth Circuit's rejection of the same argument in *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984). See *Posadas*, 478 U.S. at 344.[3]

Petitioner's reliance on *Discovery Network* is misplaced. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the noncommercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction which bore no relationship whatsoever to the particular interest that the city had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between the medium of advertising which the Baltimore ordinance restricts and media which it leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. In upholding against an equal protection challenge a 1921 Utah statute (currently codified at Utah Code Ann. § 76-10-102) which provided, much like the Baltimore ordinance in this case, that "It shall be a misdemeanor for any person . . . to

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[3] Despite Petitioner's assertion that *Posadas* has been overruled *sub silentio* by *Edenfield*, *see* Pet. 14, *Posadas* is still good law and was quoted with approval in *Coors*, 115 S. Ct. at 1591. Nor has this Court adopted a "least restrictive means" approach to commercial speech restrictions, *Went For It*, 115 S. Ct. at 2380, although that approach best explains Petitioner's argument.

display on any billboard . . . any advertisement of cigarettes, . . . provided that nothing herein shall be construed to prohibit the advertising of cigarettes . . . in any newspaper . . . ," this Court stated:

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard. . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (quoting 297 P. 1013, 1019). It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular. *Discovery Network* is thus inapposite.

* * *

In the Federal Register of August 11, 1995 (60 FR 41314), the Food and Drug Administration of the United States Department of Health and Human Services issued a proposed rule that would govern the sale and distribution of nicotine-containing cigarettes in order to protect

children and adolescents. The proposed rule would reduce the amount of imagery that makes cigarettes attractive to children and adolescents; would limit advertising to which children and adolescents are exposed to text-only format; and would ban outright advertising of tobacco products located within 1,000 feet of schools and playgrounds. *See* 60 FR 41314-41315. The proposed rule would require manufacturers, distributors, and retailers of cigarettes to comply with any more stringent state or local requirements relating to the sale, distribution, labeling, or advertising of cigarettes provided that the state or local requirement does not conflict with FDA regulations.[4] The proposed FDA regulations are supported by a veritable mountain of scientific information, including studies on the effect of cigarette advertising on children and adolescents. *See, e.g.,* 60 FR 41314-41321.

The Baltimore ordinance challenged in the instant case pales in significance compared to the sweeping federal regulation of cigarette advertising which is now under advisement by the FDA. The time for this Court to wade into the controversy is not now; if it ever arrives the proper time will be when the Court is faced with a case involving a challenge to advertising restrictions of

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[4] If adopted the proposed rule prohibiting cigarette ads on billboards within 1,000 feet of any playground, elementary school or secondary school will be codified as 21 C.F.R. § 897.30(b). If adopted the reverse preemption provision allowing local governments to adopt more stringent advertising restrictions will be codified as 21 C.F.R. § 897.42(a). *See* 60 FR 41374, 41375. FDA has extended the comment period on the proposed regulations to January 2, 1996. *See* Federal Register of October 16, 1995 (60 FR 53560).

national scope, such as those currently proposed by the FDA.

II. THE FOURTH CIRCUIT CORRECTLY DECIDED AN ISSUE OF FIRST IMPRESSION ARISING UNDER THE PREEMPTION SECTION OF THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

The second question presented in the petition concerns whether the Fourth Circuit erred in rejecting Petitioner's preemption argument under 15 U.S.C. § 1334(b). None of the reasons for Supreme Court review advanced by Petitioner withstand scrutiny: the decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising, and thus can hardly be argued to have a negative impact on the national economy and thereby upset the balance struck by Congress; no pending or proposed legislation regarding cigarette ads (*see* Pet. 6, n.5) has yet generated even one other case which would be affected by a decision of the Supreme Court; the law which the Second Circuit held was preempted in *Vango Media Inc. v. City of New York*, 34 F.2d 68 (2nd Cir. 1994), was a regulation of the *content* of cigarette advertising, requiring a minimum of one public health message to be displayed for every four tobacco advertisements displayed on property and faculties licensed by the City, and thus cannot fairly be considered to involve the same issue as the instant case or to be squarely in conflict with the decision in this case.

It cannot be seriously maintained that the decision of the Fourth Circuit constitutes a hindrance to Congress'

purpose in enacting 15 U.S.C. § 1334(b). The language and legislative history of the Act make it abundantly clear that Congress was concerned only with protecting the tobacco industry from the chaos of local laws that would alter the content or regulate the message of cigarette commercials. Local or state content regulation would make it difficult to market cigarettes on a national scale with national themes and messages. The Baltimore ordinance does not regulate content and thus poses no threat to Congress' purpose in enacting the preemption section.[5]

Furthermore, as this Court held in *Cipollone*, there is a strong presumption against preemption, and § 1334(b) must be narrowly construed. 112 S. Ct. at 2621. In *Cipollone* the Court held that tort claims against cigarette manufacturers based on fraud and misrepresentation are not preempted because they are not "based on smoking and health" as that phrase of § 1334(b) is properly construed, but rather on a more general obligation – the duty

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[5] *In Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2616 (1992) this Court referred to a 1965 statement by renowned tobacco foe Senator Frank Moss of Utah, the floor leader who guided the 1969 Act through the Senate. Senator Moss stated that his own state was considering a cigarette warning label requirement, but that he "[did] not favor individual state action in this matter because of the maze of confusing regulations which would result." 111 Cong. Rec. 13901 (1965). Senator Moss never expressed any reservation about Utah's complete ban on any public display of cigarette ads on such media as billboards, transit signs, and point-of-sale displays that had been on the books for forty years and had always been enforced. Nor did anyone else. *See Packer Corp. v. Utah*, 285 U.S. 105 (1932) *and* Utah Code Ann. § 76-10-102.

not to deceive. 112 S. Ct. at 2624. Both of the lower courts in this case were correct in holding that Baltimore's law is not "based on smoking and health" but rather on a more general obligation – "the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions." Pet. App. 38a (opinion of the district court). *Compare Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994), cert. denied, 115 S. Ct. 577 (1994) (consumer's suit against cigarette manufacturer and its advertising agencies for injunctive relief, asserting claims of unfair business practices and unjust enrichment in connection with manufacturer's advertising campaign allegedly targeted at minors, held not preempted by 15 U.S.C. § 1334(b)).[6]

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[6] As observed in both *Cipollone* and *Mangini*, the Senate Report regarding the 1969 Act emphasized that 15 U.S.C. Section 1334(b) is narrowly phrased to preempt only state action based on smoking and health but "[i]t would in no way affect the power of any State . . . with respect to the taxation of *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (emphasis added). *See Cipollone*, 112 S. Ct. at 2624 and *Mangini*, 875 P.2d at 81.

In *Mangini* the Court also observed that Congress has enacted legislation allowing certain monetary grants to states, but "only if the State involved has in effect a law providing that it is illegal for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18, and "will enforce" that law. 42 U.S.C. § 300x – 26(a), (b). A state receiving such a grant must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such products." 42 U.S.C. § 300x – 22(b)(2)(B). Quoted in *Mangini*, 875 P.2d at 82.

Petitioner argues that *Vango* is in conflict with the decision of the Fourth Circuit. To the contrary, the case is distinguishable. The point of distinction is captured in Judge Murray's opinion for the district court.

> But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus bringing the statute into conflict with the second stated purpose of the FCLAA. . . . Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

Pet. App. 42a. *See also* Pet. App. 8a-9a (court of appeals cites *Vango* with approval).

If it is the case that this Court has a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question, since the doctrine of judicial restraint has taught that patience in the judicial resolution of conflicts may sometimes produce the most desired result, then the supposed "conflict" between the decision of the Fourth Circuit in this case and the single decision of the Second Circuit in *Vango* does not provide an adequate basis for Supreme Court review.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

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Supreme Court, U.S.
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No. 95-806

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-806

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. Among the constitutional rights that WLF defends in judicial and administrative proceedings is the right of commercial free speech. To that end, WLF has appeared before this Court and other federal and state courts as an *amicus* in commercial free speech cases, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990). In addition, WLF believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act. That policy reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

Here, the Fourth Circuit's approach to the third prong of the *Central Hudson* test improperly relieves municipalities of their constitutional burden in justifying content-based bans on commercial speech. Moreover, the municipal ban of cigarette advertising at issue here occurs in a regulatory area that appears to be preempted by federal statute. The Fourth Circuit's analyses under the First Amendment and the Federal Cigarette Labeling and Advertising Act, if followed widely by lower courts, could lead to widespread denial of commercial speech rights.

All parties to this action have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below upheld, against challenges of First Amendment violation and federal preemption, a content-based prohibition on certain signs in Baltimore, Maryland. The City of Baltimore's criminal ordinance substantially restricts the outdoor advertising of cigarettes pursuant to a scheme that can best be characterized by the recent words of this Court in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995): "a unique and puzzling regulatory framework" permeated by "irrationality." Moreover, Baltimore's "unique and puzzling regulatory framework" pertains to cigarette advertising, which Congress has specifically chosen to regulate under the Federal Cigarette Labeling and Advertising Act.

In challenging the Ordinance, Petitioner presented evidence disputing the City of Baltimore's assertion that its Ordinance "is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors." *See* Appendix to Petitioner's Petition for Writ of Certiorari at 74a (hereafter "Pet. App."). However, the lower courts disregarded Petitioner's evidence on this issue under the *Central Hudson* test, and the Fourth Circuit affirmed the

district court's decision "to accept the judicially-recognized proposition that advertising increases consumption." *Id.* at 23a. Additionally, Petitioner was denied the opportunity to develop further the evidentiary record regarding any causal relationship between tobacco advertising and consumption. *Id.* at 5a. Accordingly, the First Amendment issue raised here is the appropriate standard for judging the evidentiary basis upon which the legislature professes to rely.

Since *Central Hudson*, the Circuits have split between requiring, as this Court most recently did in *Rubin*, that "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree," 115 S. Ct. at 1592 (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)) (emphasis supplied), and requiring merely, in the words of the Fourth Circuit, that it be "*reasonable*[]" for the legislature to "*belie[ve]* that the means it selected will advance its ends." *See* Pet. App. at 11a (emphasis supplied) (quoting the related opinion of *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)). The lack of a clearly defined standard encourages courts to choose the approach that most likely comports with their own policy views.

Here the Fourth Circuit erroneously assumed that there are only two alternatives under *Central Hudson*'s third prong: unbridled judicial involvement in reviewing legislative determinations as to the Ordinance's direct and material advancement of its goal, or total judicial deference in commercial free speech cases. That is a false dichotomy; holding governmental bodies that seek to impose commercial speech restrictions to the demanding evidentiary burden imposed by *Edenfield* does not require wholesale second-guessing of legislative determinations. So long as this Court continues to subscribe to the *Central*

Hudson intermediate scrutiny approach,[1/] the judiciary can continue to defer to well-supported legislative determinations without abdicating its First Amendment review function. This Court should now clarify the contours of its intermediate scrutiny approach, to prevent *both* wholesale judicial second-guessing *and* blanket judicial endorsement of legislative conclusions. Such an approach preserves meaningful review to ensure protection of the legitimate exercise of First Amendment commercial speech rights. The Fourth Circuit's approach, in contrast, amounts to no review at all.

The Fourth Circuit's complete deference to the legislature is magnified by the fact that the legislature's exercise of its local police powers has occurred in an area that appears to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* ("the Act"). The Act in its present form, which includes a broadly sweeping preemption provision, was enacted for the purpose of, *inter alia*, "[p]rohibit[ing] health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969).

Petitioner's case evidences the judicial confusion regarding the scope of the Act's preemption clause, as amended in 1969. While this Court has addressed the relationship of private damage actions to the Act's amended preemption clause (*see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)), the issue of what aspect of cigarette advertising -- if any -- remains open for regulation by a local government is an unanswered question, requiring this Court's clarification.

[1/] The alternative is the approach advocated by Justice Stevens in his concurring opinion in *Rubin*. *See* 115 S. Ct. at 1594.

The conflicting approaches adopted by courts in attempting to resolve this issue illustrate the same type of judicial activism now prevalent in the First Amendment context. Based on personal policy preferences, lower courts have either: (1) found local restrictions of cigarette advertising preempted after interpreting the restriction as health-related; (2) upheld such restrictions after interpreting them as effectuating a statutory purpose not preempted by the Act, such as prohibitions against cigarette sales to minors; or (3) conceded that the restrictions were health-related (as the Fourth Circuit did here) but nonetheless upheld them on the ground that only some types of health-related restrictions are preempted. However, the policy of national uniformity expressly embodied in the Act's statement of purpose (15 U.S.C. § 1331) calls into question this arbitrary analysis of the preemption issue.

ARGUMENT

I. THE FOURTH CIRCUIT'S OPINION ILLUSTRATES THE DISARRAY AMONG THE CIRCUITS IN APPLYING THE THIRD PRONG OF THE *CENTRAL HUDSON* TEST

A. The Fourth Circuit's Failure To Hold The City To Its Constitutional Burden Of Proof Reveals The Difficulty That The Circuits Face In Performing The Intermediate Level Of Scrutiny Mandated By The *Central Hudson* Test

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. A municipality must: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct material way"; and (3) demonstrate that the asserted government interest could not "be served as well by a more

limited restriction on commercial speech." *Edenfield v Fane*, 113 S. Ct. 1792, 1798 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has sufficient justification for its Ordinance under the latter two of these factors -- commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of "intermediate scrutiny" review for commercial speech. *See* Pet. App. at 10a-11a; *Rubin*, 115 S. Ct. at 1591.

The Fourth Circuit, in determining that Baltimore's Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's belief that the means it selected will advance its ends.

Pet. App. at 11a (emphasis supplied) (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)). On this basis, the Fourth Circuit declined to consider even the plainest contrary evidence that Petitioners submitted -- an even more extreme approach than other circuits that have adopted a "reasonableness" test. *See, e.g., Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th

Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief" that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its disregard of any contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required in an intermediate level of constitutional review to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

The straying of the Fourth Circuit from the Court's standard is not unique. Since *Central Hudson*, and even since *Edenfield* and its progeny clarifying *Central Hudson*'s standard, lower courts have exhibited confusion regarding the third and fourth prongs and the requisite level of intermediate scrutiny. Some courts reviewing commercial speech regulation have required the government to put forth empirical proof, under a "preponderance of the evidence" burden, to demonstrate the requisite direct or material advancement of the asserted goal. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994); *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). Others have

delegated their mandate to protect the First Amendment to the legislature and have refused to subject the government to a "preponderance of the evidence" burden. *See, e.g., Dunagin*, 718 F.2d at 738; *Crisp*, 699 F.2d at 490.

The latter approach has reached its nadir here and in the Fourth Circuit's related opinion, *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), which the Fourth Circuit relied upon in dismissing Petitioner's First Amendment challenge to Baltimore's Ordinance regulating cigarette advertising. In *Anheuser-Busch*, the Fourth Circuit affirmed dismissal at the pleading stage of First Amendment challenges to Baltimore's similar ban on outdoor advertising of alcoholic beverages. While the Fourth Circuit at least termed its analysis of Petitioner's claims here, against Baltimore's regulation of cigarette advertising, as one under the summary judgment standard of Federal Rule of Civil Procedure 56(c), the Fourth Circuit nevertheless disregarded Petitioner's evidence disputing Baltimore's assertion that its advertising ban "materially advances" its goal of reducing cigarette use by minors.

Moreover, the Fourth Circuit affirmed the district court's refusal to open the case up for discovery before ruling on the First Amendment issues at stake (Pet. App. at 5a), and agreed "with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law *when the government meets the burden placed on it by Central Hudson*." *Id.* at 6a (emphasis supplied). Here, however, Baltimore did not meet its burden under *Central Hudson* (i.e., to demonstrate that its advertising restriction will *in fact* alleviate cigarette use by minors to a material degree), and the Fourth Circuit failed to require it to do so. Rather the Fourth Circuit ruled that Baltimore could carry its constitutional burden

"by pointing to legislative facts, studies, history, or common sense, [and thus] an understanding of the ordinance's factual impact on particular parties [such as Baltimore's youth] is not necessary to the inquiry." Pet. App. at 7a.

The Fourth Circuit's refusal to consider Petitioner's evidence, as well as affirmance of the district court's decision preventing development of a complete evidentiary record, were inevitable given the continuing practice of some lower courts to interpret *Central Hudson*'s standard as a lower-level, "rational basis" review -- a standard, ironically, that amounts to judicial activism by forsaking the duty of the judiciary in First Amendment cases to the court's sympathy with legislative policy. Despite its inevitability, such dismissals -- either at the pleading or summary judgment stage -- stand in stark contrast to this Court's repeated statements that deference to legislative findings simply cannot limit judicial inquiry where significant constitutional principles are at stake. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 249 (1974). We therefore respectfully urge this Court to grant certiorari in this case for purposes of clarifying how the lower courts should exercise the intermediate scrutiny required under *Central Hudson*, and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson*.

B. The Fourth Circuit's Refusal To Consider Petitioner's Evidence, In Disregard Of *Central Hudson*, Sets A Dangerous Precedent

Baltimore has asserted that its Ordinance "restricting the placement of advertisements for cigarettes in publicly

visible locations within Baltimore City is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors." Pet. App. at 74a. The Ordinance contains a preamble which sets forth, as support for the alleged "necessity" of the Ordinance, select judicial opinions and excerpts from a limited number of studies published in various health and medical journals. Pet. App. at 71a-74a.

On this basis, the Fourth Circuit affirmed summary judgment in favor of Baltimore, but this case is not one properly resolved at the summary judgment stage where the evidentiary record is far from complete. Petitioner was entitled to the opportunity to show that Baltimore's grounds for its decision to circumscribe the First Amendment rights of cigarette advertisers and adult consumers were derived from political and/or controverted sources. Petitioner was entitled to the opportunity to obtain and present evidence that the case law and studies cited in the Ordinance's Preamble and legislative history, contrary to the Fourth Circuit's conclusion, do not "demonstrate in fact" that the restriction of outdoor signs advertising cigarettes "directly advances" Baltimore's campaign against underage smoking.

Moreover, it is not proper for a court to uphold a restriction on speech based on indiscriminate "judicial notice" of the restriction's direct and material advancement of its goal. For every opinion that takes judicial notice of a positive correlation between advertising and behavior, another exists which requires more than a "legislature's commonsense judgment," which the Fourth Circuit found sufficient here, that the regulation will directly and materially advance the governmental interest. Pet. App. at 7a. *See, e.g., Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that an ordinance prohibiting "For Sale" or "Sold" signs on residential property was not justi-

fied by municipality's perception that such a prohibition would reduce the flight of white homeowners from a racially integrated neighborhood); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a prohibition of contraceptive advertising was not justified on grounds that ads would legitimize sexual activity of young people).

Here, Baltimore chose its evidence selectively. For instance, nowhere on its list appears the contrary 1990 conclusion of the Federal Trade Commission ("FTC"), an independent agency which has scrutinized the impact of controversial advertising for decades. In testimony before the U.S. House of Representatives Commerce Committee, the FTC noted:

> The Commission believes that the evidence is inconclusive on the issue of the linkage between alcohol advertising and consumption. There are studies that appear to support either position, and this same conclusion is expressed in the recent report on alcohol and health by the Department of Health & Human Services.

See Health Warnings on Alcoholic Beverage Advertisements: Hearing on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 35-41, at 37 (1990) (prepared statement of the FTC) (citing U.S. Dept. of Health and Human Services, *Alcohol and Health* 211-12 (1990)). The linkage between cigarette advertising and consumption falls into a similar inconclusive category. The FTC suggested that the inconclusiveness of the evidence may be due to the limits of the available research methodology, *id.*; if true, this observation further

underscores the fact that Petitioner here should have had an opportunity to impeach the City's "evidence."[2/]

In deciding to take "judicial notice" of assumptions made by Baltimore in its own favor, and to rely unquestioningly on studies chosen by Baltimore for inclusion in the Ordinance's legislative history, the Fourth Circuit has set a troubling precedent. By according absolute deference to a legislative determination that billboards increase consumption of the advertised product by children, the Fourth Circuit is abdicating all meaningful judicial review of advertising restrictions where the legislature has an arguable basis for discouraging consumption by children.

For example, recent medical studies suggest that if eating habits do not change early in life, obese children are likely to become obese adults susceptible to early death and a variety of diseases. *See, e.g.*, S. Squires, *For U.S. Youth, Weight Becomes Growing Problem*, Wash. Post, Oct. 3, 1995, at A1; S.S. Gidding et al., *Improving Children's Heart Health: A Report From The American Heart Association's Children's Heart Health Conference*, 65 J. School Health 129 (Apr. 1995); M. Corey, *Sizing Up A Generation*, Balt. Sun, Mar. 19, 1995, at 1K (noting that top ten foods purchased by teen-agers are gum, ice cream, fast-food hamburgers, chocolate candy, pizza, nonchocolate candy, breath mints, cookies, hard candies, and potato chips). Under the Fourth Circuit's deferential reasoning, Baltimore could properly restrict outdoor signs for virtually any unpopular product or service. Surely, the third prong

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[2/] For the Court's convenience, a copy of the FTC's statement before the House Energy and Commerce Committee, cited herein, has been lodged separately with the Clerk of the Court.

of *Central Hudson* is not as flaccid as the Fourth Circuit's opinion would indicate. If the lower courts disregard *Edenfield*'s clarification of the *Central Hudson* test, the First Amendment will be subordinated to every community's evolving attitudes. The First Amendment, however, is and must be grounded on a firmer foundation.

Because the Fourth Circuit deferred unquestionly to Baltimore's "commonsense" judgment, it prevented the discovery necessary to develop a record comparing the number of advertisements affected by Baltimore's Ordinance with the number remaining in the city subject to the view of minors. Thus, the type of evidence critical to this Court's decisions in *Rubin* and *Discovery Network* does not even exist in this case. This case therefore goes well beyond the common issue of whether an appellate court "correctly" resolved a First Amendment challenge after considering the parties' respective evidence at the summary judgment stage, because the Fourth Circuit abdicated its constitutional responsibility of judicial inquiry.

II. THE FOURTH CIRCUIT'S OPINION EXEMPLIFIES THE SPLIT IN THE JUDICIARY REGARDING PERMISSIBLE STATE ACTIVITY WITH RESPECT TO CIGARETTES

In 1965, responding to state and local proposals to regulate cigarette advertising, Congress enacted the Federal Cigarette Labeling and Advertising Act ("the 1965 Act"), which required the placement of a conspicuous warning statement regarding the health risks of smoking on every package of cigarettes sold in the United States. 15 U.S.C. §§ 1331-1340 (1982 ed.). The purposes of the 1965 Act were to: (1) adequately inform the public that cigarette smoking may be hazardous to health; and (2) protect the

national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations. *Id.* at § 1331. The 1965 Act included an express preemption provision providing that:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at § 1334(b).

Four years later, in the wake of preparations by State governments to pass further regulations regarding cigarette advertising, Congress passed the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"), which amended the 1965 Act by strengthening the mandatory warning label and banning cigarette advertising on radio and television. 15 U.S.C. §§ 1331-1340, as amended (1995 Supp.). Significantly, the 1969 amendments clearly provided a broad scope for the preemption section which now reads:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id. at § 1334(b). Furthermore, the amended Act expressly preserved the jurisdiction of the Federal Trade Commission over false and deceptive advertising. *Id.* at § 1336(b).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 509 (1992), this Court granted certiorari to resolve a split in the Circuits "[b]ecause of the manifest importance of the issue"

of whether various common-law claims were preempted by Section 1334(b) as originally drafted in the 1965 Act and as amended in 1969. In comparing the preemptive scope of the 1965 Act to the 1969 amendments, this Court found the language of the amended preemption provision to be "much broader" than that of its 1965 predecessor. *Id.* at 520. As this Court noted, the later amendments bar "not simply 'statement[s]' but rather 'requirement[s] or prohibition[s] ... imposed under State law.'" *Id.* The Ordinance at issue here is indisputably a "prohibition imposed under State law with respect to the advertising" of cigarettes by outdoor signs in certain parts of the city. Also, the City conceded during oral arguments in the Fourth Circuit that its advertising restriction was designed to advance public health goals. Thus, this case turns on whether, as argued by the Fourth Circuit, the 1969 Act preempts only those health-related cigarette advertising restrictions that regulate the *content* of signs, not those that regulate sign *location*.

The few courts that have considered this issue offer conflicting views regarding whether the 1969 Act left any local police powers intact to regulate cigarette advertising -- and if so, what the extent of those remaining police powers might be. Some courts have taken a broad view of preempting health-related restrictions, looking beyond the non-health justifications cited by the legislature. For example, in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994), the Second Circuit held that the 1969 Act preempted a city ordinance requiring at least one public health message to be displayed for every four tobacco advertisements displayed on property and facilities licensed by the city. The Second Circuit found that New York City's ordinance was indeed a "requirement ... based on smoking and health ... with respect to the advertising or promotion of any cigarettes" because the ordinance's declaration of legi-

slative findings noted "the grave dangers posed by tobacco use" and "the problem of smoking by minors," and the ordinance's effect "would be to educate the public as to the adverse health risks of smoking." *Vango*, 34 F.3d at 73.

In so ruling, the Second Circuit rejected New York City's argument that its ordinance was enacted in light of the economic costs related to smoking, as evidenced by the legislative finding, contained in the ordinance, that "tobacco use threatens the general welfare of all New Yorkers by causing enormous financial costs to the taxpayers, in the form of health care benefits, and a loss of productivity among the city's workforce." *Id.* Moreover, the Second Circuit found unpersuasive New York City's point "that the Local Law is not aimed at advertising or promotion, but is geared rather towards informing the City's youth of the dangers of cigarettes." *Id.* at 74. Whether the ordinance was "geared" by the legislature towards advertising was immaterial to the Second Circuit since the ordinance's impact was the same as an advertising regulation, and quite different from the effect of restrictions on cigarette sales to minors or smoking in public places -- regulatory powers which the legislative history clearly indicates are not preempted by the 1969 Act. S. Rep. No. 566, 91st Cong., 1st Sess. 1, 12 (1969); *Cipollone*, 505 U.S. at 529 n.26.

Similarly, a district court has held that a plaintiff was preempted from challenging the "Joe Camel" advertising campaign for the "Camel" brand of cigarettes, where the plaintiff's claims asserted that the campaign was an unlawful and unfair business practice because it targeted minors. *See Sparks v. R.J. Reynolds Tobacco Co.*, No. C94-783C, slip op. (W.D. Wash. Dec. 9, 1994). As a remedy, the plaintiff sought to enjoin the defendant cigarette company from targeting minors with its ad

campaign, and to require the defendant to distribute corrective advertising to negate the effect of the allegedly unfair ads. *Id.* at 2. Although the plaintiff characterized her suit as one seeking a prohibition based on the defendant's duty not to violate the law by inducing illegal cigarette sales to minors, rather than a prohibition based on smoking and health, the district court was unpersuaded by this semantical "form over substance" argument:

> The remedy plaintiff seeks here would bar certain advertisements so that minors would not be induced to smoke, and become addicted, while at a stage in life when they are unable to make mature decisions. Plaintiff's professed purpose is to protect children. The effect of the remedy plaintiff seeks would be to prevent children from becoming addicted to nicotine, a health concern. Thus the effect of plaintiff's cause of action is also health-based.

Id. at 7 (citations omitted).

Under the analysis of *Vango* and *Sparks*, Baltimore's Ordinance, restricting certain outdoor cigarette advertisements for the purpose of decreasing minors' cigarette consumption, is health-based -- despite Baltimore's citation, as the first legislative finding in the Ordinance's preamble, to the Maryland statute that makes it illegal to provide cigarettes to minors. Pet. App. 70a. The statute authorizing the City's action expressly refers to health,[3/] and the

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[3/] Baltimore's Ordinance cites to Section 404 of Article 27 of the Maryland Code as its statutory authority (Pet. App. at 70a). As originally enacted in 1886, this section was entitled "An Act

(continued...)

legislative history is replete with references to health as well. For instance, as justification for this prohibition, the preamble of Baltimore's Ordinance cites, *inter alia*, to a State Department of Education survey which found that:

> Cigarettes constitute a "gateway drug" among Maryland students, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date.

Pet. App. 73a-74a. In addition, the Ordinance's preamble cites to ten articles in medical and health journals, each of which identifies health risks as the underlying reason for research regarding the smoking habits of children and their awareness of cigarette advertising. *Id.* at 72a-73a. Thus, Baltimore's Ordinance seeks to restrict outdoor advertising of cigarettes in areas of the city where minors "live, attend school, attend church and engage in recreational activities" (*id.* at 75a) precisely because Baltimore is concerned about the health and well-being of the youth within its municipal boundaries. Under the *Vango Media/Sparks* analysis, Baltimore's restrictions on cigarette advertising are clearly preempted under the broader preemptive provision of the 1969 Act because the Ordinance is "based on smoking and [the] health [of Baltimore's children]."

Other courts have been less generous toward preemption, including the district court and Fourth Circuit in this case, which ruled that Baltimore's Ordinance was not preempted by the 1969 Act. The district court viewed the

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[3](...continued)
To Protect The Health And Morals Of Minors In The State Of Maryland."

Ordinance as "clearly aimed at the illegal sale of cigarettes to minors," and therefore not preempted because "[i]t is certainly within the City's power to pass a law meant to effectuate a valid State law." Pet. App. at 37a. The Fourth Circuit reached the same result based on its interpretation that Baltimore's "regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated." *Id.* at 9a.

In ruling against Petitioner on the preemption issue, the Fourth Circuit has followed an analytical approach which stands in direct contrast to that of *Vango Media* and *Sparks*. The Fourth Circuit's approach also differed from that of the California Supreme Court, which held that the 1969 Act did not preempt unfair business practices claims asserted against an advertising campaign allegedly targeted at minors "for the purpose of inducing and increasing their illegal purchases of cigarettes." *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 75 (Cal.), *cert. denied*, 115 S. Ct. 577 (1994). The plaintiff's action was allowed to go forward because the court viewed the claim as predicated upon a duty not to engage in unfair competition by encouraging others to violate the law, rather than upon a duty based on smoking and health. In so ruling, the California court rejected the argument that health concerns actually underlay the plaintiff's action, emphasizing instead the penal statute prohibiting cigarette sales to minors which, according to the court, resulted from the state's nineteenth-century desire to protect the morals of its youth rather than from modern health concerns. *Mangini*, 875 P.2d at 81.

In addition to the overall split on the appropriate approach to preemption as it affects the issue of whether a restriction is health-based, the partial ban in this case presents some unique issues not previously addressed by

this Court. Justice Blackmun, in his concurring and dissenting opinion in *Cipollone*, observed in dictum that an outright ban on cigarette advertising would be preempted under the Act. 505 U.S. at 539. And, the statutory scheme of which the preemption provision is a part includes a national ban on radio and television ads, suggesting that Congress may have intended that any partial advertising bans would be enacted on a national basis.

The states and localities are now poised to enact a variety of regulations affecting cigarette advertising, or to apply existing regulations to that activity (*see* Petition at 6 n.5), just as they were when Congress enacted the Cigarette Labeling and Advertising Act, and when this Court decided *Cipollone*. Again, because of the "manifest importance of the issue," we urge this Court to resolve the conflict in interpreting a statute that, in its own words, bears heavily on health and the national economy alike.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Outdoor Advertising Association of America, Inc. (the "OAAA"), the national trade

association of the standardized outdoor advertising industry in the United States. The OAAA's functions include the promotion of outdoor advertising as a medium of public communication.

The OAAA's membership is composed of approximately 200 companies which serve 7,900 distinct local areas throughout the United States. Four OAAA member companies, including Petitioner Penn Advertising of Baltimore, Inc. ("Penn"), maintain operations within the City of Baltimore.

The OAAA and its member companies have a direct interest in this case because it presents fundamental questions regarding the authority of state governmental entities to prohibit the dissemination of constitutionally protected commercial speech on outdoor advertising signs. In addition, the OAAA and its member companies have a direct interest in assuring that the Federal Cigarette Labeling and Advertising Act ("FCLAA") is complied with and that its members will not become subject to the "diverse, nonuniform, and confusing" regulations regarding cigarette advertising that FCLAA was intended to prevent. Thus, the issues in this case transcend those of a mere dispute between a single outdoor advertising company and a single governmental unit, and instead require this Court's interpretations on crucial issues regarding the First Amendment and Federal statutory law. If certiorari is not granted and if the Fourth Circuit's decision is ultimately permitted to stand, OAAA members will immediately be confronted by a welter of conflicting prohibitions and restrictions that will affect their businesses and their ability to communicate messages to the public regarding tobacco and other products.

All parties to this action have consented to OAAA's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

In 1994 the City of Baltimore enacted Ordinance 307, which prohibits cigarette advertising on billboards in much of the City, in contravention of the First Amendment to the Constitution of the United States and in defiance of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.* In upholding Baltimore's Ordinance 307, the Fourth Circuit failed to apply this Court's well defined test for evaluating the constitutionality of restrictions on commercial speech and read the preemption provision of FCLAA out of existence in contravention of this Court's directives for interpreting the scope of the preemptive effect of an act of Congress.

The Fourth Circuit's decision that Baltimore had the authority to enact prohibitions on the dissemination of cigarette advertising is based on a patently incorrect construction of FCLAA. The only issue in construing the applicability of FCLAA is a determination of whether Baltimore has enacted a "requirement or prohibition" of cigarette advertising that is "based on smoking and health." The City has conceded that Ordinance 307 is such a law and therefore the court of appeals' characterization of Ordinance 307 as "locational" is erroneous and directly frustrates the purpose of Congress in enacting FCLAA — to assure that commerce and the national economy are not impeded by diverse, nonuniform, and confusing cigarette advertising regulations.

The Fourth Circuit's decision also stands in stark conflict with this Court's admonition that where the government seeks to defend the constitutionality of a restriction on commercial speech it must demonstrate that ". . . the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). The Fourth

Circuit's virtually complete deference to the findings of the Baltimore City Council, based on their seeming "reasonableness," eviscerates this standard of review and permits the government to restrict commercial speech in the service of other objectives which could not survive a First Amendment challenge. *Ibid.* Moreover, this retrogression from the standard of review mandated by this Court's rulings destroys the ability of the courts to determine whether, as in this case, a superficially "reasonable" restriction of speech may in fact be a pretext for advancing a different legislative agenda.

This case is one in which the facts strongly indicate that Baltimore had the objective of using its purported interest in reducing the smoking of cigarettes by minors to achieve a goal which could not justify a burden on commercial speech. Although Baltimore claims that its goal is to reduce smoking by minors, the ordinance is so underinclusive that the only advertising medium seriously affected by the ordinance is billboards. Not coincidentally, Baltimore has had a largely unsuccessful 40 year battle to eliminate billboards from many areas of the City. The highly deferential review of Ordinance 307 by the district court and the Fourth Circuit effectively prevented the plaintiff billboard company from demonstrating the underinclusiveness of the ordinance and precluded an examination of whether Ordinance 307 serves objectives other than the reduction of smoking by minors.

ARGUMENT

I. THE FOURTH CIRCUIT ERRED BY HOLDING THAT ORDINANCE 307 IS NOT PREEMPTED BY THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

Section 5 of the Federal Cigarette Labeling and Advertising Act ("FCLAA") states that:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). This Court has held that the preemptive scope of this provision is governed entirely by its express language. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Despite the wording of Section 5 of FCLAA and the directive of this Court in *Cipollone*, the court of appeals completely ignored the express language of Section 5 in holding that Ordinance 307 was not preempted by FCLAA.

In the instant case there is no dispute that the cigarettes at issue are labeled in conformity with the provisions of FCLAA. There is no dispute that Ordinance 307 prohibits the placement of advertisements for cigarettes on billboards in areas of the City. There is no dispute that the City Council passed Ordinance 307 because of its concerns about the perceived health risks related to

smoking by minors.[1] Yet somehow the court of appeals found that, despite these undisputed facts, Ordinance 307 was not a "requirement or prohibition based on smoking and health . . . with respect to the advertising of cigarettes. . . ." Instead, the court of appeals concluded that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a.

The court of appeals' decision makes no sense in this

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[1] In its briefs before the district court and the court of appeals, the City had argued that Ordinance 307 was not enacted because of concerns about smoking and health. However, during oral argument before the Fourth Circuit, counsel for the City conceded that the Baltimore City Council had enacted Ordinance 307 out of its "concern with the health of children." *See*, Ct App. Tr. 23. Indeed, in its analysis upholding the constitutionality of Ordinance 307, the Fourth Circuit found that the City's objective of reducing cigarette consumption by minors was a substantial governmental interest when viewed "[i]n the context of the current public concern over the dangers of cigarette consumption by minors. . . ." Pet. App. 10a.

There cannot be a serious argument at this juncture that the Baltimore City Council was not motivated by concerns over smoking and health when it enacted Ordinance 307. The fact that there is evidence that the Baltimore City Council also was motivated by a desire to restrict billboards in Baltimore does not change this analysis. Where a state or local law is motivated by more than one purpose, this Court has held that, so long an one of the purposes is impermissible, the law is preempted by federal law. *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992); *Perez v. Campbell*, 402 U.S. 637 (1971).

regard and stands in direct conflict with Supreme Court precedent. The simple fact is that Ordinance 307 prohibits currently existing billboards in certain areas of the City of Baltimore from continuing to carry a certain category of advertising. That prohibited category of advertising is defined solely in terms of the content of the advertising. Ordinance 307 is simply a partial prohibition of cigarette advertising.

This Court has specifically rejected the Fourth Circuit's reasoning as recently as 1993 in its decision in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). In *Discovery Network*, the City banned newsracks containing "commercial handbills," while permitting newsracks containing "newspapers." The City of Cincinnati argued that the law was content-neutral and should be judged under the "time, place, manner" test. This Court rejected the Cincinnati's argument, stating:

> Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the rack. Thus, by any commonsense understanding of the term, the ban is "content-based."

Discovery Network, 113 S. Ct. at 1515-16.

In the instant case, whether any particular advertisement falls within the ban of Ordinance 307 is determined not only by the *location* of the billboard but also by the *content* of the advertising displayed on the billboard. Thus, as in *Discovery Network*, "by any commonsense understanding of the term" the ban of Ordinance 307 addresses the content of the advertising on billboards. There is simply no way to square this Court's analysis in *Discovery Network* with the Fourth Circuit's analysis in the

instant case.

Taken to its logical conclusion, under the Fourth Circuit's analysis, as long as the City of Baltimore did not attempt to ban *all* cigarette advertising in all advertising media in the City, any lesser ban of cigarette advertising would be a limitation on "location" and not on "content." The vacuousness of the Fourth Circuit's logic is painfully apparent.

When Congress enacted FCLAA, it required health warnings on cigarette packages (and later cigarette advertising). Congress also enacted the preemption provision of FCLAA, 15 U.S.C. § 1334(b), in order to assure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

The action of the City of Baltimore in enacting Ordinance 307 stands in direct conflict with the express will of Congress as set forth in FCLAA. The action of the Fourth Circuit in holding that Ordinance 307 is not preempted by FCLAA is nothing less that a judicial rewriting of an act of Congress which totally changes the purpose and effect of Section 5 of FCLAA.

The Baltimore City Council does not have the power to ignore FCLAA – an act of Congress – because it does not like it. The Fourth Circuit erred when it countenanced Baltimore's conduct in defying the express wording of FCLAA by holding that Ordinance 307 was not preempted because it did not address the "content" of cigarette advertising.

The Fourth Circuit's decision results in precisely the circumstance Congress explicitly sought to avert when it enacted

Section 5 of FCLAA: "diverse, nonuniform and confusing" cigarette advertising regulations with respect to a relationship between smoking and health. Cigarette advertisers now have one set of advertising regulations in Baltimore and another set in the rest of the country. And, given the degree of interest in the issue of cigarette advertising, it is virtually certain that other members of the OAAA will soon be confronted with other localities following Baltimore's lead and enacting their own peculiar laws banning cigarette advertising on billboards in some, or all but one or two locations, or even all locations within their jurisdiction.

It has been well settled law since 1819 that, under Article VI of the Constitution, a state law which conflicts with a federal law is of no effect. *McCulloch v. Maryland*, 4 Wheat. 316, 472 (1819). This Court has also held that the purpose of Congress in passing a federal act is the ultimate touchstone of preemption analysis. *Cipollone*, 505 U.S. at 516. While an express preemption provision like FCLAA should be fairly and narrowly interpreted, *Cipollone*, 505 U.S. at 523, a narrow interpretation is not the same thing as a construction which is so unreasonably cramped that it reads FCLAA out of existence. *National Broiler Council v. Voss*, 44 F.3d 740, 743 n.1 (9th Cir. 1995). The Fourth Circuit's action is particularly egregious because FCLAA is often cited by the lower courts as the archetype of "broad pre-emption clauses." *Ibid.* 44 F.3d at 745; *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993); *Stamp v. Collagen Corp.*, 984 F.2d 1416, 1421 (5th Cir. 1993).

This Court should grant the petition for certiorari so that it may consider whether the court of appeals' decision upholding Ordinance 307 is inconsistent with the express will of Congress as set forth in Section 5 of the Federal Cigarette Labeling and Advertising Act and contrary to the decisions of this Court

interpreting Article VI of the Constitution. To do otherwise would be to invite the "diverse, nonuniform and confusing" regulation of cigarette advertising that Congress intended to prevent when it enacted FCLAA.

II. THE FOURTH CIRCUIT'S DECISION, IF ALLOWED TO STAND, WILL PERMIT GOVERNMENTAL ENTITLES TO USE COMMERCIAL SPEECH RESTRICTIONS AS A PRETEXT TO ACHIEVE UNDISCLOSED GOALS

The Petition for Certiorari brings to this Court's attention a case of major significance because the decision of the court of appeals, if permitted to stand, will completely compromise judicial review of governmental restrictions on protected commercial speech. If the Fourth Circuit's decision is left unattended, analysis of commercial speech prohibitions inevitably will shift in many lower courts from the fact-driven standard for review established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), to a lower level of scrutiny based solely on the superficial ". . . reasonableness of the legislature's purpose. . . ." Indeed, this Petition is particularly compelling because the manner in which this case was disposed of crystallizes this Court's deepest concerns that a regulation of commercial speech may easily be used as a pretext for achieving some unrelated and undisclosed purpose if the government is not held to its burden of demonstrating that ". . . the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). This Court has emphasized, and reemphasized its fears that:

> [w]ithout this requirement, a state could with ease

> restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech.

Ibid. *See* also, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995).

There is much to suggest that this is precisely what occurred in Baltimore in 1993 when the City Council determined that billboards were the only medium where the dissemination of cigarette and alcoholic beverage advertising[2] that should be prohibited. There are clear indicia that these measures, postured as restrictions on speech to protect minors, were pretextually enacted as an artifice to destroy the economic base for certain billboards that the City has unsuccessful sought to eliminate for more than forty years. But because of the lower courts' failure to apply the *Edenfield* standards and the resulting rush to judgment without independent judicial scrutiny of Ordinance 307 and the companion restrictions on alcoholic beverages at issue in *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995), Penn was effectively checked from ever even bringing these matters to the fore in this litigation

The burden of a governmental restriction on commercial speech often falls on the medium that disseminates the restricted message, as well as upon the advertiser itself. But in this case, the motivations underlying Baltimore's restrictions on publicly visible cigarette advertising become inherently suspect because

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[2] The Baltimore Ordinance affecting alcoholic beverage advertising on billboards is the subject of a separate petition for certiorari. *See*, *Anheuser-Busch v. Schmoke*, No. 95-685.

the weight of these restrictions falls disproportionately — if not exclusively — on the outdoor advertising medium.

This case is haunted by the fact that, despite the City Council's professed concern regarding the dissemination of cigarette advertising in publicly visible locations, the regulation actually adopted exempts virtually every publicly visible medium except for billboards. For example, although cigarettes are sold in literally thousands of retail locations throughout the City, the City Council nonetheless elected to exempt the dissemination of advertisements on signs located on the exterior of these establishments. Despite the City Council's professed concern regarding the effect of such advertising on minors, it inexplicably exempted all of the advertising signs located in such obviously child-oriented venues as the City's landmark Oriole Park at Camden Yards, as well as the signs that blanket the public transit buses that circulate freely within the City — including those buses that daily transport thousands of Baltimore children to school.

Outdoor advertising is the only publicly visible medium within Baltimore that is affected in any substantial manner by the prohibitions in Ordinance 307. In fact, billboards are the only medium disseminating cigarette advertising in the City that sustains any significant economic impact from the regulation. Indeed, one of the few uncontroverted facts in the record reveals that even cigarette advertisers themselves are not as severely impacted as Penn, since the advertisers can readily switch to other exempt publicly visible media or to the other media such as newspapers, magazines and in-store advertising that are left completely untouched by Ordinance 307. *See, e.g.*, Ct. App. J.A. 1121-1147. But Ordinance 307's seemingly inexplicable exemptions, and the completely disproportionate economic burden that these commercial speech restrictions place on outdoor

advertising alone, are simply the most overt indicia that Baltimore's ostensible effort to curtail cigarette advertising on billboards may mask other more subtle legislative objectives.

The true motivation behind the Baltimore City Council's effort to preclude Penn from disseminating cigarette and alcoholic beverage advertising — two of the largest categories of advertising in the United States — comes into sharper focus when Ordinance 307 is considered within the broader context of the City's contentious record of attempted billboard regulation. As discussed above, the Fourth Circuit's dismissal of this regulation as "locational" in character makes no sense in the context of an analysis of FCLAA. However, the lower court's perception is particularly revealing in considering whether the commercial speech restrictions are a convenient pretext for exerting economic pressure on Penn to remove the billboards at these proscribed locations.

The simple fact is that Baltimore has had a forty year record of unsuccessful efforts to force Penn and its predecessors to eliminate billboards from the City. Beginning in 1950, the City has enacted a succession of ordinances that categorized Penn's billboards located in commercial/residential zones as nonconforming uses and ordered their removal after the expiration of a short so-called "amortization" period. Ultimately in 1957, the Maryland Court of Appeals sustained this use of City's police power. *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301 (1957). But Baltimore's actions in this regard were effectively blocked in 1983 when the State of Maryland amended the Maryland Code to require municipalities to pay fair market value for any lawfully erected outdoor advertising sign that they require to be removed. Md. Code Ann.

art. 25, § 122E (1994).[3] Around the same time, the focus of the City's billboard removal efforts shifted from enforcement of zoning controls to the enactment of content-based regulations aimed at eliminating billboards from certain districts in the City. The first such effort is documented in a 1982 district court decision in *Metromedia v. Baltimore*, 538 F. Supp. 1183 (D. Md. 1982). There, the district court applied this Court's decision in *Metromedia v. San Diego*, 453 U.S. 490 (1981) to strike down a Baltimore ordinance that would have forced the elimination of billboards in certain sections of the City while imposing narrow content-based restrictions on the on-premise signs that were permitted to remain.

In 1990, the City again became embroiled in billboard litigation that is particularly revealing in terms of the City Council's professed desire to curtail cigarette and alcohol advertising because it resulted from a specific determination by the City to forgo an immediate reduction of such advertising and instead to press for the removal of billboards. *See*, *Chesapeake Outdoor Enterprises, Inc. v. Mayor of Baltimore*, 89 Md. App. 54 (1991). In 1989, Kurt Schmoke, the Mayor of Baltimore, entered into an agreement with a Baltimore billboard company other than Penn in which the parties resolved a longstanding dispute by providing for the immediate removal of 100 billboards and for a four-year phased reduction of tobacco and alcohol beverage advertising to 40% and 35% respectively of the remainder of that

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[3] The relevant terms of Section 122E are substantially similar to those contained in Maryland Senate Bill 702, which was approved by the Maryland legislature in 1982 but was subsequently vetoed by Governor Harry Hughes. *See, Chesapeake Outdoor Enterprises, Inc. v. Mayor of Baltimore*, 89 Md. App. 54, 66 (1991).

company's signs. The agreement had already become operative when the City reneged and refused to comply with the agreement because it would have blocked the City from forcing the removal of more of Chesapeake's signs under the zoning laws. The billboard company sued to enforce the agreement but the Maryland Court of Special Appeals held that the City was within its authority to repudiate the agreement. *Ibid.*

Is it simply a coincidence that the billboards that Penn is prohibited from using for the dissemination of tobacco and alcoholic beverage advertisements are the very same signs that the City has been attempting to remove without compensation for forty years? The original "amortization" law enacted in 1950 made all billboards located in specific commercial zones nonconforming uses and attempted to force their removal without compensation. But a Maryland statute now requires the payment of compensation for such forced removal. Baltimore's companion restrictions on cigarette and alcohol beverage advertising target the same lawfully erected nonconforming billboards, while exempting other signs scattered within isolated commercial and industrial zones.

Complex factual questions like these will never reach the surface in litigation if the Fourth Circuit is correct and judicial review of commercial speech restriction is confined to a superficial review of the ". . . reasonableness of the legislature's purpose. . . . ," Pet. App. 11a, *quoting, Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995). The issue of whether a restriction on protected speech is pretextual involves the most subtle factual inquiry and judicial sensitivity. This is particularly true where, as in this case, the questionable prohibition targets both controversial speech and a controversial medium. In a true sense, the fate of the First Amendment issues in this case was sealed when, only thirty days after Penn filed its

complaint in this case, the district court denied Penn's Expedited Motion for an Extension of Time To Take Discovery. *See,* Ct. App. J.A. 933. At that juncture, this became a runaway case in which the district court, perhaps inadvertently, effectively shielded itself from the facts. If the Fourth Circuit is correct that a legislature is able through careful drafting to wrap itself in an impenetrable barrier of seeming reasonableness, in a short time there will be little left to the *Central Hudson* doctrine.

CONCLUSION

Baltimore has passed a content-based prohibition of cigarette advertising based on smoking and health in direct contravention of the Federal Cigarette Labeling and Advertising Act. The Fourth Circuit's decision that the ordinance is not preempted has resulted in the approval of a law which undermines the express purpose of FCLAA to prevent "diverse, nonuniform and confusing" regulation of cigarette advertising and invites other communities to also defy and frustrate the express will of Congress set forth in FCLAA.

The Fourth Circuit's extremely deferential review of Baltimore's ordinance also conflicts with this Court's explicit rules regarding the burden of proof through judicial review that must be applied against any restriction on commercial speech. If allowed to stand, the Fourth Circuit's decision will encourage other courts to ignore this Court's clear direction that the government must demonstrate that its restrictions on commercial

speech in fact meet the test for such restrictions and will invite other localities to restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, IN HIS OFFICIAL CAPACITY AS MAYOR OF BALTIMORE CITY; DAVID TANNER, IN HIS OFFICIAL CAPACITY AS THE GENERAL SUPERINTENDENT OF ZONING ADMINISTRATION AND ENFORCEMENT OF BALTIMORE CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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In opposing the grant of certiorari, the City does not take issue with *any* of the principal points made in the petition. It thus does not deny that, under the Fourth Circuit's approach, a court applying intermediate First Amendment scrutiny may ask only whether the legislature *reasonably could have believed* that restrictions on speech were warranted — a holding that plainly is inconsistent with this Court's decisions. The City similarly does not contend that there is *any* evidence suggesting that the peculiar and gerrymandered restrictions in Baltimore's ordinance *will in fact* have a *direct and material* impact on underage smoking — a finding that, under this Court's holdings, is essential to uphold a limit on speech. The City does not deny that, as we noted in the petition, the Fourth Circuit's preemption analysis permits states and localities to completely ban cigarette advertising. And the City nowhere disputes the great practical importance of the issues presented here; the City does not, and could not, deny that restrictions like those in the ordinance are being considered or implemented by other municipalities around the country. In these circumstances, further review of the important and recurring issues presented here is warranted.

A. Review Of The First Amendment Issue Is Warranted

1. We explained in the petition that, when exercising intermediate First Amendment scrutiny of a restriction on speech, this Court has held that courts must engage in an "'independent judgment of the facts'" said to support the restriction. *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion) (citation omitted). We also demonstrated that the court of appeals, in sharp contrast, believed that courts exercising intermediate scrutiny may assess only "'the reasonableness of the legislature's belief'" that it acted rationally in restricting speech. Pet. App. 11a (citation omitted). This is a very significant difference in approach — one that could be outcome-dispositive in this and many other cases. The City's brief in opposition makes *no response at all* to this point, which establishes beyond peradventure that the choice of standard of

review in commercial speech cases is important enough to warrant consideration by this Court.

Indeed, the City's only comment at all on the standard of review applied by the court of appeals is its assertion (at Br. in Opp. 5-6) that other courts are unlikely to follow the Fourth Circuit's error. But the clarity of the court of appeals' decision — as well as the full Fourth Circuit's refusal to rehear the case in banc — makes plain that the holding below was not an aberration in that Circuit. Moreover, as explained in the petition (at 13-14), review by this Court is essential to ensure that lower courts are not led astray by arguably confusing language in *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The court of appeals understood those decisions to stand for the proposition that a restriction on commercial speech will be upheld whenever there is a logical connection between the legislative means and ends. See Pet. 14. We explained in the petition, however (at Pet. 14), that neither *Edge* nor *Posadas* stands for such a principle, and any such rule could not in any event be reconciled with the Court's most recent decisions. Again, the City makes *no response at all* to these points.[1]

2. We explained in the petition (at 14-15) that, under the third prong of the *Central Hudson* test, a governmental body seeking to limit commercial speech must demonstrate that "'its restriction *will in fact* alleviate [the harms targeted

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[1] The City does observe (at Br. in Opp. 9 n.3) that *Posadas* was cited in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995). But *Posadas* was cited there for its holding regarding the substantial nature of the government's interest in discouraging gambling, not for the unrelated proposition — endorsed by the court of appeals and the City here — that courts may disregard evidence establishing the inefficacy of a challenged restriction on speech.

by the government] to a material degree'" (*Coors*, 115 S. Ct. at 1592 (citation omitted) (emphasis added)); the Fourth Circuit, in contrast, held that "'it is *not* necessary * * * to prove conclusively that the correlation in fact exists.'" Pet. App. 11a (citation omitted) (emphasis added). The City's attempt to explain away this inconsistency entirely misses our point. The City notes (Br. in Opp. 7-8) the court of appeals' recognition that the *City Council* pointed to evidence in the *legislative record* suggesting that advertising stimulates smoking by minors. But the City pointedly does not assert that the court of appeals either itself reviewed the evidence before the trial court or found that the ordinance "will in fact" reduce underage smoking.

In addition, as we also explained in the petition (at 15-17), whether or not there necessarily is a general relationship between advertising and demand — a point that was hotly disputed and was not resolved by either court below — there is absolutely *no* evidence that *Baltimore's* ordinance will reduce smoking by minors at all. The gerrymandered advertising ban worked by the ordinance permits literally thousands of cigarette advertisements to remain throughout the City in locations sure to be seen by minors. For that matter, while the ordinance punishes billboard owners, there is no reason to believe that the ordinance will achieve *any* net reduction in the number of tobacco advertisements on outdoor signs of one kind or another to which minors are exposed. See Pet. 17. In these circumstances, the court of appeals' approach would read the third prong out of the *Central Hudson* test. Again, the City makes *no response at all* to this point.

3. The City's argument under the fourth prong of *Central Hudson* is similarly nonresponsive. We explained in the petition (at 19-20) that the ordinance is fatally underinclusive under *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), because there is no meaningful difference between the advertisements that are barred and the

innumerable other outdoor signs that are unaffected. In response, the City relies (Br. in Opp. 9-10) upon *Packer Corp.* v. *Utah*, 285 U.S. 105 (1932), where the Court held that a state may rationally distinguish between billboard and newspaper advertisements. In fact, *Packer* — which was decided long before commercial speech first received constitutional protection — did not involve a First Amendment claim at all. But our point, in any event, is that the Baltimore ordinance improperly discriminates *within* the category of outdoor advertising, barring billboards while allowing other indistinguishable outdoor signs at sports arenas and retail stores, and on taxicabs and buses.[2] As we noted in the petition (at 18 & n.13, 19) — and as the *amicus* brief of the Outdoor Advertising Association confirms — this patent underinclusiveness of the ordinance raises the inference that the City is restricting speech "in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1800 (1993). Again, the City makes *no response at all* to this point.

4. The City sets out a red herring when it suggests (at Br. in Opp. 10-12) that the Court should defer review of the issue presented here because the Food and Drug Administration has proposed a rule that would restrict

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[2] While the point is obscured by strategically placed ellipses in the City's recital of the statute at issue in *Packer* (at Br. in Opp. 10-11), that Utah law expressly *barred* kinds of outdoor (and, for that matter, indoor) tobacco advertisements that are expressly *permitted* by exceptions to the Baltimore ordinance. The Utah statute thus precluded tobacco advertisements "'on any bill board, street car sign, street car, placard, or on any other object or place of display.'" 285 U.S. at 107 (citation omitted). The only exception was for a dealer in cigarettes, who was permitted to "'have a sign on the front of his place of business stating that he is a dealer in such articles.'" *Ibid.*

cigarette advertising. The FDA proposal would not moot the issues in this case even if it were validly implemented *in toto*.[3] In any event, there is no way to know what the rule will look like when it is in final form, or whether or when it will be promulgated — and if it is put in place the rule surely will be subject to innumerable challenges on grounds unrelated to the First Amendment. In the meanwhile, the decision below will stand as an important precedent that provides guidance (legally erroneous, we submit) to municipalities across the nation as they seek to limit the advertising of tobacco, alcohol, and other disfavored products. Review of this case therefore is imperative.

B. The Preemption Question Warrants Review

We explained in the petition that the court of appeals' decision regarding preemption threatens to undermine a carefully crafted legislative compromise, providing a roadmap for states and municipalities that seek to evade the requirements of the Federal Cigarette Labeling and Advertising Act. The City's arguments against review of the Fourth Circuit's preemption holding are insubstantial.

1. The City's principal contention (at Br. in Opp. 12-13) is that state and local governments may ban cigarette advertising outright, so long as they do not "alter the content

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[3] While the FDA's proposed rule would prohibit outdoor tobacco advertising within 1000 feet of schools and playgrounds, it would require all remaining outdoor tobacco advertising to comply with otherwise valid state or local requirements. 60 Fed. Reg. 41314, 41374, 41375-41451. Those requirements, of course, would be subject to the very sort of First Amendment scrutiny sought here but denied below. In addition, because the FDA does not and could not itself purport to negate the limits on state and local power imposed by the Federal Cigarette Labeling and Advertising Act, the Act's preemption provision would remain highly pertinent even if the FDA's rule were validly adopted as proposed.

or regulate the message of cigarette commercials." This contention is simply incorrect. As the Court noted in *Cipollone*, Congress substantially broadened the Act in 1969 so as to preempt, not just the regulation of health-related "*statements* * * * in the advertising of cigarettes" (15 U.S.C. § 1334(b) (1965) (emphasis added)), but any "requirement *or prohibition* based on smoking and health * * * with respect to the advertising or promotion" of cigarettes. *Ibid.* (as amended in 1969) (emphasis added). See S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969) (emphasis added) (the Act "[p]rohibits health-related *regulation or prohibition* of cigarette advertising"). And there is no doubt that the ordinance, which prohibits the advertising of cigarettes on billboards, is the very model of a "prohibition * * * with respect to the advertising" of cigarettes.[4]

2. The City also makes the rather implausible assertion that the ordinance is not "based on smoking and health" because in promulgating the advertising ban the City Council was motivated exclusively, not by any concern for the health of minors, but instead by its interest in aiding the enforcement of a state law that bars the sale of tobacco to underage purchasers. Br. in Opp. 13-14; see *id.* at 1-4. The short answer to this argument is that it was not the basis for the holding below; while recognizing the public health interests served by the ordinance,[5] the court of appeals

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[4] Because the ordinance is an express regulation of the content of advertising — it determines whether an advertisement is permissible by reference to its content — the City's contention (Br. in Opp. 12) that "the decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising" is a *non sequitur*, as well as a misinterpretation of the nature of the statutory preemption.

[5] See Pet. App. 10a (noting that "the City's objective in reducing cigarette consumption by minors constitutes a substantial

rejected the preemption challenge because it believed that the Act does not preempt restrictions that limit "only the *location* of signs that advertise cigarettes." Pet. App. 9a (emphasis in original). That the court of appeals did not endorse the City's current position is hardly surprising: although the City now unaccountably denies it (see Br. in Opp. 1), the City's counsel expressly conceded at oral argument before the Fourth Circuit that the ordinance was enacted out of "concern[] with the health of children." Ct. App. Tr. 23.[6] Having prevailed before the court of appeals by offering one account of the ordinance's purpose, the City cannot now defeat review in this Court by changing its tune.

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public interest" given "the context of current public concern over the dangers of cigarette consumption by minors").

[6] The City asserts (Br. in Opp. 1) that it is "constrained to address Petitioner's misstatement[]" that it conceded that the ordinance was in fact based on health concerns. But the City never explains how we misstated its position, which it expressed at oral argument as follows:

> Judge Butzner: Well, a judge saying [the ordinance] doesn't relate to smoking and health is pretty far fetched, isn't it? * * * .
>
> Mr. Levin: I don't want to stand here and say the city council is not concerned with the health of children. Obviously it is. But I also want to say that it is not impermissible for the city council to be concerned with the health of children * * * .
>
> Judge Butzner: That is why they are doing it.
>
> Mr. Levin: Well, they are, but, I mean, the state law is that that designed to protect the health of minors is insulated from attack * * * .

Ct. App. Tr. 23.

3. Moreover, entirely apart from the court of appeals' rationale, the ordinance cannot be saved on the theory that "Baltimore's law is not 'based on smoking and health' but rather on a more general obligation — 'the duty not to advertise products which are illegal for sale to minors * * *.'" Br. in Opp. 14 (citation omitted). The ordinance is not a general ban on the advertisement of products that cannot lawfully be sold to minors; it is specifically directed at cigarette advertising, is concededly based on the perceived connection between smoking and health, and is defended as effectuating a state law that itself was premised on health concerns.[7] If accepted, the City's argument would provide states and localities with a subterfuge that could be used to justify any restriction on cigarette advertising, an outcome that would render the Act nugatory. Cf. *Perez* v. *Campbell*, 402 U.S. 637 (1971).

4. The City attempts to distinguish *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), on the ground that the restriction at issue in that case affected the content of cigarette advertisements. Br. in Opp. 15. But the City simply ignores the actual holding of *Vango Media*, which it nowhere quotes or cites. The Second Circuit invalidated the counter-advertising requirement at issue in *Vango Media* — even though, under New York City's restriction, "the actual cigarette advertisements would not look different" (34 F.3d at 74) — because the court understood the Act to preempt *any* state or local requirement that "treads on the

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[7] As we explain in the petition (at 23 n.15), the Maryland statute that precludes the sale of cigarettes to minors — and whose enforcement the ordinance purportedly assists — is *itself* related to smoking and health. If the ordinance were intended to encourage compliance with that law, it surely would have to be understood to share the law's purpose. The City makes no response at all to this point.

area of tobacco advertising." *Ibid.* The Second Circuit went on to explain that

> advertisers and promoters like Vango would be substantially impacted by the Local Law's requirements. Perhaps were § 1334(b)'s 1965 provisions still in effect, we might be persuaded by the proposition advanced by the City that Congress only meant to preempt state and local laws that change the actual look of cigarette advertisements. But, the more expansive reach of § 1334(b), as clearly evidenced by its amended language, precludes that result.

Ibid. There is no doubt that Baltimore's ordinance would be invalid under this holding.

* * * *

We noted in the petition (at 27-28) that the First Amendment issue presented here is similar to the one currently before the Court in *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140; we therefore suggested that the Court either grant the petition or consider holding it pending disposition of *44 Liquormart*. The City acknowledges that *44 Liquormart* "is tangentially related" to this case (Br. in Opp. 5 n.2) but asserts conclusorily that "the decision in that case is not likely to shed new light on the law." *Ibid.* We take this unilluminating declaration to be a tacit concession that the Court should hold this case for *44 Liquormart* if it chooses not to grant review at this time.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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SUPPLEMENTAL BRIEF FOR PETITIONER

In light of this Court's recent decision in *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140 (May 13, 1996), the Court should grant the petition in this case, vacate the judgment of the court of appeals, and remand the case so that the Fourth Circuit may apply the correct legal standard under the First Amendment. As we anticipated in our earlier briefs (Pet. 27-28, Reply Br. 9), the issues of commercial speech regulation addressed in *44 Liquormart* are similar to those presented in this case, and the Court's decision in *44 Liquormart* confirms the error of the Fourth Circuit's constitutional analysis.

1. As we explained in the Petition (at 6), the Fourth Circuit held in this case that "a restriction on commercial speech must be upheld so long as the enacting legislature rationally could have believed, on the basis of the materials it had gathered, that the restriction would advance important state interests." Relying on this Court's decision in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), the court below stated that "[t]he proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends." Pet. App. 11a (quoting *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)) (emphasis added). In this case, however, instead of carefully reviewing the available evidence to determine whether the City in fact satisfied the contested elements of the *Central Hudson* standard, the Fourth Circuit deferred to the City Council's judgment that the outdoor advertising ban would advance its goal of reducing tobacco sales to minors. Pet. App. 10a; *id.* at 18a, 22a-24a (district court opinion).

This Court repudiated that analysis in *44 Liquormart*. It held that a restriction on truthful, non-misleading advertising could not be upheld in the absence of a specific factual showing that the speech restriction actually *does* advance the government's asserted goal, and does so *significantly*. *44 Liquormart*, slip op. 18-19 (opinion of Stevens, J.); see also slip op. 11 (Thomas, J., concurring in part and concurring in

the judgment); slip op. 4-5 (O'Connor, J., concurring in the judgment) (courts must not "accept at face value the proffered justification for the State's regulation, but [must] examine[] carefully the relationship between the asserted goal and the speech restriction used to reach that goal"). Moreover, the Court expressly disavowed the "highly deferential approach" urged by the government as an application of *Posadas*. Slip op. 24 (opinion of Stevens, J.); slip op. 4-5 (O'Connor, J., concurring in the judgment).

Thus, in both *44 Liquormart* and this case, the government failed to meet its obligation under *Central Hudson* to demonstrate *to the court* "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart*, slip op. 18 (opinion of Stevens, J.). According to the standard articulated in *44 Liquormart*, the reviewing court "must determine whether the [government] has shown that the [restriction on speech] will *significantly*" advance the government's interest. *Ibid.* (emphasis in original). The level of detail required to support a restriction on truthful, non-misleading commercial speech is substantial. See slip op. 20 (opinion of Stevens, J.) (noting absence of evidence concerning what price level would significantly reduce alcohol consumption and the amount prices would decrease without the ban). Without detailed proof demonstrating that the speech restriction *in fact* significantly advances the government's specific goals, the reviewing court would be required "to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the [government's] asserted interest." *Ibid.* In this case, the district court did not even hold an evidentiary hearing, which would have allowed the parties to elucidate and test the efficacy of the speech restriction.

2. *44 Liquormart* also makes clear that the Fourth Circuit erred by failing to require the City to show "that its restriction on speech [is] no more extensive than necessary."

Slip op. 21 (opinion of Stevens, J.). This Court re-emphasized that the narrow tailoring requirement is not met if "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [government's] goal." *Ibid.* As Justice O'Connor remarked, "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." Slip op. 2 (O'Connor, J., concurring in the judgment). A restriction on speech is not narrowly tailored when the government's goal of modifying behavior could be accomplished by regulating that behavior directly. See *44 Liquormart*, slip op. 21 (opinion of Stevens, J.); slip op. 8 (Thomas, J., concurring in part and concurring in the judgment); slip op. 3-4 (O'Connor, J., concurring in the judgment).

By contrast, the Fourth Circuit deemed the effectiveness of less speech-restrictive means to be a matter of little relevance to its constitutional analysis. The court of appeals held that the First Amendment requires only that "the City would have to *consider* those [less speech-restrictive alternatives] * * * [not] that the City must abandon altogether an approach that directly advances its goal," even if it is not narrowly tailored. Pet. App. 11a-12a (quoting *Anheuser-Busch*, 63 F.3d at 1316) (emphasis added). We identified several direct regulatory alternatives that would have advanced the City's asserted goal without prohibiting truthful, non-misleading speech, but the courts below refused even to consider those less restrictive alternatives. See Pet. 18-19. This approach cannot be squared with this Court's decision in *44 Liquormart*.

3. This Court concluded its opinion in *44 Liquormart* by emphasizing that the government must "carry [a] heavy burden of justifying" a prohibition on truthful, non-misleading commercial speech. Slip op. 31. The Fourth Circuit plainly failed to impose that rigorous burden on the City. Instead, in

regard to (a) deference to the legislative judgment, (b) efficacy of the restriction on speech, and (c) availability of non-speech alternatives, the Fourth Circuit's approach is flatly inconsistent with *44 Liquormart*. Therefore, the writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded for reconsideration in light of this Court's discussion of the proper First Amendment standard.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

This supplemental brief in opposition is filed in light of *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (1996 WL 241709, decided May 13, 1996). The decision in that case provides no proper occasion for entry here of a summary reconsideration order. The premises upon which the Fourth Circuit decided this case are not undercut by the rationale in any of the separate opinions in *44 Liquormart*. Remand for further consideration is not warranted. *See, Lawrence v. Chater*, 116 S.Ct. 604, 607 (1996) (*per curiam*).

Both factually and legally, the instant case is far removed from *44 Liquormart*. The Fourth Circuit did not even cite the flawed decision of the First Circuit, much less rely on it. In upholding Baltimore's limited restriction on the placement of billboards advertising cigarettes, the Fourth Circuit placed no reliance on the "greater includes the lesser" reasoning of *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354-346 (1986), nor on the notion that commercial speech jurisprudence includes a "vice exception." The Fourth Circuit's opinion adheres faithfully to *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), which in the aftermath of *44 Liquormart* remains the standard binding on all lower courts.

The principal opinion in *44 Liquormart* teaches that " 'special care' should attend the review of . . . blanket bans" of commercial speech. *44 Liquormart*, 1996 WL 241709 *9, quoting *Central Hudson*, 447 U.S. at 566. Unlike the blanket ban involved in *44 Liquormart*, the instant case involves a *limited* restriction on the location of billboards,

and allows ample alternative means for *billboard* advertising. Thus, even with reference to the rationale of part V of the opinion authored by Justice Stevens, this is a case for application of less than strict review. The Fourth Circuit did, however, hold Baltimore to its burden of demonstrating beyond mere speculation and conjecture that its restriction would advance its concededly substantial purpose. The Fourth Circuit found that Baltimore met its burden by reference to studies showing a definite correlation between cigarette advertising and underage smoking, which is a method of proof endorsed by this Court. *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2378 (1995).

Unlike *44 Liquormart* and *Posadas*, this case does not involve a speech ban which screens from public view the underlying governmental policy. Baltimore's purpose is to reduce underage smoking. The most direct method to achieve that goal – banning the *sale* of cigarettes to minors – has been tried without adequate success. Because Baltimore found, based on competent evidence, that a direct regulation of cigarettes is insufficient to dampen demand by minors, its reasonably tailored and limited restriction on speech promoting cigarettes is permissible. *Cf. 44 Liquormart*, 1996 WL 241709 *18 (Thomas, J., concurring in part and concurring in the judgment) and *19 (O'Connor, J., concurring in the judgment).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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